Supreme Court, U.S.
FILED

001891 JUN 18 2001

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No. _____

In The
Supreme Court of the United States

George C. Samson, et al.

Petitioners,

v.

Apollo Resources, Inc,
doing business as Apollo Services Inc;
Jeffrey A. Reddoch and Chiquita Reddoch

Respondents,

On Petition for Writ of Certiorari
To The United States Court of
Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether The Circuit Court Erred By Refusing To Give Deference To Several Recent Department Of Labor (DOL) Published Opinion Letters Interpreting The Applicable DOL Regulation, As Well As Ignoring DOL's Fact-Finding In An Actual Investigation Of The Employer In Question, When The Court Allowed The Employer To Take Deductions From Its Employees' Guaranteed Salaries That Are Prohibited By DOL Opinion Letters And Practices?

PARTIES TO THE PROCEEDING

Petitioners

George C. Samson, III; Kevin D. Smith; Melvin K. Smith; Douglas W. Bell; Christopher A. Cornes; Norman J. Landry; John Batiste; Michael S. Briscoe; Jared Broussard; J. C. Crescionne; John Dauphin; Richard Forrestier; Forrest Green, Jr.; Chris Gremillion; Roycie Harrington; Jackie D. Hays; Joe Alan Hibbs; Ron E. Jackson; Brent C. Manuel; Robert A. Nolan; John Claude Pilette, Jr.; Mark Roberts; Charlie Soulier; Danny D. Thrower; Kevin Vincent; Brian K. Wilson; Willie A. Young, Jr.; Cornelius P. Manning; Lester D. Weaver; Crawford R. Norton. Petitioners are individuals and have no corporate affiliations.

Respondents

Apollo Resources, Inc, doing business as Apollo Services Inc; Jeffrey A. Reddoch and Chiquita Reddoch. Jeffrey A. Reddoch and Chiquita Reddoch are individuals (President and Vice President of Apollo Services, respectively). None of the Respondents have parent companies or subsidiaries.

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OPINIONS BELOW

The opinion for the United States Court of Appeals for the Fifth Circuit is reported at *Samson, et al. v. Apollo Resources, Inc., et al.*, 242 F.3d 629 (5th Cir. 2001), and appears at Appendix A (page 1a). The Judgment issued from the United States District Court for the Western District of Louisiana is unreported, but appears at Appendix C (page 28a). The Additional Reasons for Judgment issued by the United States District Court for the Western District of Louisiana is also not reported, but appears at Appendix D (page 30a).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit Court ("Court of Appeals") was entered on February 20, 2001. The Court of Appeals denied a timely filed Petition for Panel Rehearing on March 20, 2001. The Order for the Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit is unreported, but appears at Appendix B (page 26a). This petition for writ of certiorari is filed within 90 days from that date. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REGULATION INVOLVED IN CASE

The regulation involved is set forth in Appendix K (page 72a). It is 29 C.F.R. § 778.114 – Fixed Salary For Fluctuating Hours

STATEMENT OF THE CASE

A. Background Of Governing Law And Policy

In 1938, Congress passed the Fair Labor Standards Act (FLSA) that mandated, among other things, that non-exempt workers[1] must be paid time and one-half for all overtime hours. 29 U.S.C. § 207(a)(1). The purpose of the Act was to help ensure full employment by financially penalizing employers who choose to work their existing employees overtime hours rather than hire additional workers.[2] The circuit court's opinion below, along with recent decisions from other circuits, effectively negates Congress' will as enacted in the FLSA as well as this Court's decision in *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942).

Under the normal FLSA payplan, an employer pays the employee for the actual hours worked and in those weeks where the employee works more than 40 hours, the employer must pay time and one-half the hourly wage for those "overtime hours." This payplan can cause problems for both employers and employees when employees work "fluctuating hours." Under these circumstances, some employees are willing to forego their FLSA statutory right to time and one-half for overtime hours in

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[1] Non-exempt workers are defined as those who are not executives, administrators or professionals. 29 U.S.C. § 213(a)(1).

[2] *E.g.*, *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 152 (5th Cir. 1982). Under the FLSA, an employer who chooses to work an existing employee more than 40 hours per week has to pay time and one-half for overtime hours, whereas the employer only has to pay straight-time wages if it hires another person to do the work instead. In the FLSA, Congress reasoned that it was better to have two employees working 40 hours per week than one employee working 80 hours and the other unemployed. Both situations cause family and societal problems; the unemployed worker cannot support his family and the other worker has no time to take care of family and parental responsibilities.

return for a guaranteed salary.[3] In 1942, this Court addressed the situation in *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942), wherein this Court authorized an employer to pay its nonexempt employees a guaranteed salary as long as the employer paid a small additional sum for overtime hours. The additional sum was to be calculated using the fluctuating workweek formula; the fluctuating workweek formula was invented before enactment of the FLSA and it essentially pays less than half-time for overtime hours (based on a decreasing sliding-scale) not time and one-half.[4] This Court allowed the employer to gain an advantage over its competitors (paying less than half-time for overtime hours rather than time and one-half) because the employer guaranteed that the salary would be paid in all situations no matter how many hours the employee worked.

In response to *Overnight Motor*, the U.S. Department of Labor (DOL) promulgated 29 C.F.R. § 778.114 which allows employers to use the fluctuating workweek formula to calculate overtime pay, but the DOL placed several restrictions/requirements on when an employer could use the 29 C.F.R. § 778.114 payplan. One of the restrictions/requirements is that the employer must pay the employee the agreed-upon guaranteed salary even in those weeks in which the employee

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[3] Employers receive the benefit of knowing their payroll costs in advance for planning purposes.

[4] Therefore, this pay method does not penalize employers who work their employees overtime as mandated by Congress in the FLSA. In fact, this pay method encourages employers to work their existing employees overtime hours rather than hire additional workers because the employer is allowed to pay only half-time wages to the existing employee who works overtime hours where it would have to pay full-time wages if it hired a new employee to work those hours instead.

works less than 40 hours.[5] Since *Overnight Motor*, this Court has not addressed its decision, nor has it addressed 29 C.F.R. § 778.114.

For employers who want to take advantage of the discounted overtime rate offered through 29 C.F.R. § 778.114, DOL (Wage & Hour Division) Letter Rulings clearly prohibit the employer from taking salary deductions, even when employees miss work due to "illness" (their own as well as family members), "personal business," "personal reasons" or "vacation."[6] The reason for the deduction prohibition is simple, in *Overnight Motor* this Court required the salary to be guaranteed in order for the employer to get to pay only half-time for overtime hours, instead of time and one-half.

B. Factual Background

Apollo utilized 29 C.F.R. § 778.114 to pay most of its employees. From late 1994 to 1996, the DOL investigated

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[5] This is the quid pro quo, the employee agrees to forego his/her statutory right to time and one-half in return for the security of a guaranteed salary and only "half-time" for overtime hours.

[6] 5/18/66 DOL Opinion Letter Ruling No. 479, Labor Law Rep. (CCH) ¶30,997.18, reprinted in Gilbert J. Ginsburg, et al., Fair Labor Standards Handbook app. III at 104 (1996)(Deductions from salary are prohibited when the employee misses work due to illness or personal business.)(App. 53a); 12/24/97 DOL Opinion Letter, 1997 WL 998050 (Salary deductions are prohibited when employee misses work for personal reasons or illness.)(App. 58a); 3/28/96 DOL Opinion Letter, 1996 WL 1031769 (Salary deductions are prohibited when an employee misses work due to vacation.)(App. 62a); 2/27/95 DOL Opinion Letter, 1995 WL 1032466 (Salary deductions are prohibited when an employee misses work for personal reasons or illness.)(App. 65a); 4/20/99 DOL Opinion Letter, 1999 WL 1002390 (Under 778.114 payplans, the employee's salary is guaranteed, "[t]herefore, no deductions in the employee's salary . . . are allowed.")(App. 68a).

Apollo's payment practices and found that it was making improper salary deductions from its employees' 778.114 payplans. The DOL found that 65 employees were owed $385,915, the vast majority of which was for improper salary deductions. The DOL sent notice letters to the affected employees informing them of the results of the investigation and their right to bring a private action against Apollo pursuant to 29 U.S.C. 216(b).

One of the employees who received a DOL notice letter was plaintiff Norman Landry. It is undisputed that Apollo docked Landry's guaranteed salary in weeks where he missed a few hours of work for personal business, illness and vacation. During his employment with Apollo, there were only four weeks where Landry worked less that 40 hours. In three of these weeks, Apollo docked his guaranteed salary even though Apollo had pre-approved all of the absences. One week in which Apollo took deductions was when Landry missed work for physician/diagnostic testing to determine the cause of severe headaches.[7] In the second week, Landry missed one day of work to move his family home.[8] In the third week that Landry's salary was docked, he was granted a vacation day (Friday) and Landry fully expected to be called in on the weekend. Instead, Apollo called in another welder, Landry did not work 40 hours that week, and Apollo docked his guaranteed salary anyway. Landry quit soon after finding out that his salary was docked for that week. At trial, Apollo freely

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[7] Landry is a welder and severe headaches caused potential safety problems for him, his co-workers who worked nearby and the persons who used the equipment welded by him.

[8] At trial, the judge stated, "I don't care what that opinion letter says" [referring to DOL Opinion Letter No. 479], that he was not going to make Apollo pay Landry the guaranteed salary when he missed a day of work to move his family (personal business). Trial Transcript pp. 1191-92 (R. at Vol. 22).

admitted that it docked its employees' guaranteed salaries when they missed work for personal business, Trial Transcript p. 53, ln. 8-12 (R. at Vol. 17), and that it had a policy of doing so. Trial Transcript p. 1221, ln 8-15 (R. at Vol. 22).

At trial, Apollo admitted that it did not change its deduction policies as a result of the DOL investigation and continued to take deductions in the same manner it did prior to the investigation. For example, Apollo took deductions from plaintiffs George Samson, Melvin Smith and Kevin Smith when they were sick.[9]

In the instant case, Apollo's employees averaged 60 hours per week even though most were told at the time of hiring that they would average only 40 hours per week.[10] Hence, Apollo saved substantial sums of money by paying only half-time for overtime hours.[11]

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[9] In addition to the plaintiffs' testimony that they were sick, all of Apollo's internal documents state that they were sick. Plaintiffs Trial Exhibits 10, 39, 41, 48 & 49.

[10] George Samson, Kevin Smith, Kyle Smith and Brent Manuel testified that they were told, at hiring, that they would have to work long weeks and short weeks but that they would average 40 hours per week. In actuality the typical Apollo employee had to go offshore to work on an oil rig for seven days, working 12 hours per day (84 hour weeks), and then on his return, when he was promised to be off the entire next week, he was called into work in Apollo's yard for another 35 hours. Then in the third week, he was sent offshore and the cycle started again.

[11] Apollo's employees typically earned $500 per week ($12.50/hour). In a week in which an employee worked 60 hours, under normal time and one-half payplans, the employee would have earned $875. Under the fluctuating workweek formula, the employee earned only $583.33. Under 778.114, the employee earned only $83.33 for the last 20 hours of work in that week.

C. Procedural History

The trial began with thirty plaintiffs and was scheduled to last one week. After one week, only six plaintiffs had testified and the district court realized that there were numerous legal issues that had never been addressed by the Fifth Circuit (and some that had not been decided by any court). So to save time, the parties and the district court agreed to sever the remaining plaintiffs into a separate trial and stay that action, finish the trial of the first six plaintiffs, take appeals to settle the legal issues, and then resume the trial for the remaining plaintiffs.

REASONS FOR GRANTING THE WRIT

I.

This Petition For Certiorari Involves Issues Larger Than The Proper Interpretation Of A Department Of Labor Regulation, Rather It Involves Whether A Circuit Court Can Substitute Its Own Interpretation Of An Agency Regulation Over That Of The Agency Who Promulgated And Enforces The Regulation On A Daily Basis

A. Applicable Supreme Court Law Provides That The DOL Is Entitled To Great Deference In Interpreting Its Own Regulations And The District And Circuit Courts Erred In Substituting Their Own Inconsistent Interpretation

As stated in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), the DOL is entitled to great discretion in interpreting its own regulations. *See also, Skidmore v. Swift & Co.*, 323 U.S. 134,

139-140 (1944).

The district court admitted that it had no knowledge of 778.114 payplans before hearing this case, but yet the district court, as well as the circuit court, failed to give any deference to DOL's interpretation of 29 C.F.R. § 778.114. As stated by this Court, an agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997)("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation.") Clearly, given the DOL's written opinion letters, Apollo's salary deductions violated DOL's interpretation of its own regulation. *See The Five DOL Opinion Letters Cited In Footnote 6 And Attached In The Appendix at 53a, 58a, 62a, 65a and 68a.*

Specifically addressing the DOL's 1966 Wage & Hour Opinion Letter No. 479, the district court stated that it did not care what Opinion Letter 479 said, that Landry would have to be a "mental midget" to think that he was going to be paid his guaranteed salary in the week he had personal business to move his family. Trial Transcript p. 1192 (R. at Vol. 22)

In addition to ignoring the DOL's written and published interpretation letters governing improper salary deductions, the courts failed to acknowledge that the DOL investigated Apollo and cited Apollo for taking improper deductions. So the courts ignored DOL's fact-finding as well as the DOL's own application of its regulations to Apollo's actual employment practices.[12] At trial, Apollo admitted that it did not change its deduction policies even after it was cited by the DOL. And by their decisions, the district and circuit courts reversed the DOL

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[12] At trial, Apollo admitted that the DOL was following the dictates of DOL Opinion Letter No. 479 when it cited Apollo. Trial Transcript p. 130, ln. 21-24; p. 56, ln. 21 - p. 57, ln. 16 (R. at Vol. 17).

and approved and affirmed the very deduction policies for which Apollo was cited.

B. A Decision By This Court Is Necessary To Provide Guidance To Lower Courts As To The Deference Agencies Should Be Given In Interpreting Their Own Regulations

In *Auer v. Robbins*, 519 U.S. 452, 461 (1997), this Court requested the DOL to submit an amicus brief to clarify the DOL's interpretation and earlier pronouncements on a wage and hour issue. Similarly, in *Samson v. Apollo*, to resolve any doubts, the plaintiffs requested the circuit court to request an amicus brief from the DOL and the circuit court chose not to do so.

The only opinion letter cited by the plaintiffs that was addressed by the courts was DOL's 1966 Letter Ruling No. 479. Fifth Circuit Opinion at App. 17a-19a; District Court Opinion at App. 48a-49a. Letter Ruling No. 479 states that salary deductions are prohibited when the employee misses work due to illness or personal business. Both courts speculated that the DOL had abandoned the deductions policy position stated in 1966 based on unrelated language in the 1967 Wage & Hour Field Operations Handbook that permits disciplinary deductions.[13] *Id.* However, both courts ignored

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[13] DOL Letter Ruling No. 479 and the Field Operations Handbook are talking about apples and oranges. DOL Letter Ruling No. 479 prohibits deductions when an employee misses work due to illness or for personal business while the Handbook addresses when disciplinary deductions may be made. The two provisions cover totally different kinds of absences and can be read together without conflict. The Handbook language on disciplinary deductions is also contained in an unpublished 1982 DOL letter the defendants referred to as the "Otter Letter" (App. 55a) and 1969 DOL Opinion Letter No. 988. In its investigation of Apollo, the DOL District Director distinguished the Otter

and failed to even acknowledge later opinion letters issued by the DOL, especially the ones issued in 1995, 1996, 1997 and 1999, wherein the DOL reiterated the position stated in its 1966 Letter Ruling No. 479 that salary deductions are not allowed in 29 C.F.R. § 778.114 payplans when employees miss work due to illness, personal business, personal reasons, vacation, etc. *See The Five DOL Opinion Letters Cited In Footnote 6 And Attached In The Appendix at 53a, 58a, 62a, 65a and 68a.*

Like the circuit court, the district court did not request an amicus brief from the DOL concerning the status of Wage & Hour Letter No. 479 and DOL's policy on allowable salary deductions. However, since the deduction policy issue was one of first impression for both courts, they should have requested amicus briefs from the DOL as to the agency's interpretation of its policy regarding impermissible salary deductions especially since the DOL's citation of Apollo, and the plaintiffs' case, were based on this issue.

In its opinion, this Court could take the opportunity to provide guidance to lower courts recommending that they should request amicus briefs from the applicable federal agency when the court is asked to interpret an agency regulation for the first time. This is especially true when the court "speculates" that the agency may have reversed a prior policy.

Similarly, the plaintiffs suggest that a DOL amicus brief might aid this Court in evaluating this cert petition with a minimum of effort. The Court would be helped by the longstanding expertise of the Labor Department in this area due to the technical workings of the Fair Labor Standards Act and

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Letter from the reasoning in Letter Ruling No. 479 in a letter he sent to Apollo explaining why Apollo was cited for taking improper deductions. Trial Transcript pp. 47-52, 56-57 (R. at Vol. 17). In their opinions, the courts failed to even acknowledge that, in this very case, the DOL addressed why the Field Operations Handbook language and Otter letter ruling did <u>not</u> apply, but the principles stated in Letter Ruling No. 479 <u>did</u> apply.

especially 29 C.F.R. § 778.114 payplans.

II.
The Issue Presented Has Important Federal Impact And Involves An Unsettled Question of Law That Should Be Settled By This Court With This Particular Case Because The Decision Below Subverts The Fair Labor Standards Act Overtime Provisions And This Court's Decision In *Overnight Motor*

A. Since No Other Circuit Court Has Evaluated The DOL's Position On Impermissible Salary Deductions, The Fifth Circuit's Decision Provides The Only Interpretation Of The Issue For The Nation And That Decision Allows Employers To Undermine The Intended Protections Afforded To Employees By The Fair Labor Standards Act And This Court's *Overnight Motor* Decision

No other circuit court has evaluated the DOL's position on salary deductions under 29 C.F.R. § 778.114 payplans.[14] As such, if permitted to stand, the Fifth Circuit's decision in *Samson v. Apollo* will be law for the country. In its opinion, the Fifth Circuit allows employers to not pay the guaranteed salary when their employees do not work a full 40 hours, but yet the

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[14] Two district court opinions have recently cited DOL's Wage & Hour Opinion Letter No. 479 as being good law, and one of these opinions even comes from a lower court in the Fifth Circuit. *Yourman v. Dinkins*, 865 F.Supp. 154, 164-65 (S.D.N.Y. 1994), *quoting*, Wage & Hour Opinion Letter No. 479, *aff'd*, 84 F.3d 655 (2nd Cir. 1996), *rev'd on other grounds*, *Giuliani v. Yourman*, 519 U.S. 1145 (1997); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 895 at FN 24 & 25 (E.D.Tex. 1997).

employers can still calculate overtime pay using the fluctuating workweek formula (instead of time and one-half). The Fifth Circuit ignored this Court's previous directive by eliminating the quid pro quo that was the basis of the *Overnight Motor* decision (i.e., the employee agrees to forego his statutory right to time and one-half for overtime hours in return for a guaranteed salary) and the basis for DOL's 29 C.F.R. § 778.114 regulation.

Armed with this Fifth Circuit decision, employers will begin to use 778.114 payplans as opposed to the general payplan set-out by Congress in the Fair Labor Standards Act at 29 U.S.C. § 207(a)(1)(time and one-half for overtime). By using 778.114 payplans, these employers will be able to circumvent Congress' express will to "economically punish" employers who decide to work existing employees overtime hours rather than hire unemployed or underemployed workers who may be on welfare and unemployment. *E.g.*, *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 152 (5th Cir. 1982).

B. This Court Needs To Provide Guidance On 29 C.F.R. § 778.114 Payplans As The Fifth Circuit's Decision And Recent Decisions From Other Circuits Have Systematically Eroded Employee Protections Established By This Court And Congress

Another DOL limitation on use of 29 C.F.R. § 778.114 payplans is that the parties must agree that the pay is adequate "under the circumstances of the employment as a whole." 29 C.F.R. § 778.114(c). On its face, the provision requires that the employee must agree to be paid under 29 C.F.R. § 778.114 before the employer can enjoy the benefits of the 778.114 payplan. However, recent court decisions from other circuits have disagreed with this logical interpretation. *See*, *Valerio v.*

Putnam Associates, Inc., 173 F.3d 35, 39 (1st Cir. 1999)(employer can pay overtime according to fluctuating workweek formula even when the employer and employee have not agreed on how overtime will be calculated); *Mayhew v. Wells*, 125 F.3d 216, 218-20 (4th Cir. 1997); *Zoltek v. Safelite Glass Corp.*, 884 F.Supp. 283, 286-87 (N.D.Ill. 1995). These decisions, along with the Fifth Circuit decision below, abrogate Congress' overtime mandate because an employer can now pay only half-time for overtime hours, take deductions for absences and do all this without the employees' consent.

C. The Issue Presented In This Petition Is Ripe For Decision And This Court Should Decide The Issue Now Because Similar Cases Rarely Rise To This Level

The Court should take the opportunity to decide the issue presented in this cert petition in lieu of waiting for the issue to arise through a later case. Wage and hour cases are very expensive to litigate and there is no guarantee that other circuits will even hear cases on point, much less have the issues reach this Court. Blue-collar workers cannot afford to pay the hourly fees involved in bringing a wage and hour lawsuit much less the costs of appeal. Further, it is rarely economically feasible for attorneys to take these cases on a contingency fee basis especially when there is negative precedent from a circuit court, as there is here, and wage and hour cases do not qualify for class action status. 29 U.S.C. § 257.

It is doubtful that the Department of Labor will raise the issue on appeal as the DOL's Solicitor's office is understaffed and must allocate its resources to the hundreds of other statutes and regulations it enforces. The DOL's limited resources, coupled with the expensive cost of litigating wage and hour cases, has resulted in few cases involving 29 C.F.R. § 778.114 payplans being presented to this Court, much less ones

involving improper salary deduction issues.

Even if litigation costs were not so expensive, it would be better to handle the issue now rather than let employers change their conventional payroll systems to 29 C.F.R. § 778.114 payplans based on the erroneous Fifth Circuit decision. Given current delays in the judicial system, it will take many years before these new payplans can be litigated, appealed and cert petitions filed. So it could be several years before this Court would have its next opportunity to undo the damage that has been done by the circuit court's decision.

III.

The Plaintiffs Are Only Asking This Court To Do For Blue-Collar Workers What It Did For White-Collar Workers In *Auer v. Robbins*, 519 U.S. 452 (1997), Namely To Affirm The DOL's Policies Regarding Permissible And Impermissible Deductions From Pay

The plaintiffs are only asking this Court to do for blue-collar workers what it did for white-collar workers in *Auer v. Robbins*, 519 U.S. 452 (1997)(J. Scalia), namely to affirm the DOL's regulatory interpretations regarding impermissible salary deductions. In *Auer*, this Court affirmed that DOL's interpretation of 29 C.F.R. § 541.118 was controlling over lower court opinions. *Id.* at 456-458. (29 C.F.R. § 541.118 governs salaries for white-collar workers–i.e., executives, administrators and professionals. The DOL's interpretation of that regulation prohibits the employer from making salary deductions for disciplinary reasons. *Id.* at 456-458.)

In *Samson v. Apollo*, both the district and circuit courts refused to apply *Auer* to this case. The circuit court refused to even address *Auer* even though it was cited and discussed in the

plaintiffs' briefs. The District Court said that the reasoning in *Auer* only applied to white-collar worker payplans (salaried payplans governed by 29 C.F.R. § 541.118) and not to blue-collar worker payplans (salaried payplans governed by 29 C.F.R. § 778.114). App. 49a.

The plaintiffs are merely asking this Court to enforce for blue-collar workers what it enforced for white-collar workers in *Auer*—that the DOL's interpretation of its own regulations trumps that of lower Federal courts. Specifically, the DOL's interpretations on impermissible salary deductions, as enunciated in numerous DOL opinion letters, should be controlling.

IV.

It Is Time For The Court To Revisit The Policies It Created In 1942 In *Overnight Motor*, And Address The Proper Application Of 29 C.F.R. § 778.114 Payplans

In the 1942 *Overnight Motor* decision, this Court created a narrow exception to Congress' mandate that time and one-half should be paid for all overtime hours. In the opinion, this Court limited its application to very specific circumstances, the main one being that the employer must guarantee the salary in exchange for the lower overtime rate. However, the circuit court's decision below has eliminated the guaranteed salary requirement while still allowing the employer to avoid Congress' overtime requirement. Further, in its opinion below, the circuit court disregarded many established policies set by Congress. The circuit court's opinion should be reversed to prevent it from being cited as recent (hence valid) precedent in lieu of this Court's *Overnight Motor* decision.

A. The Plaintiffs In This Case Are

Representative Of The Types Of Blue-Collar, Family-Supporting Employees The FLSA Was Designed To Protect

The FLSA was designed to protect typical blue-collar workers because, without union protection, they lack the negotiating power of their employers. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-707 (1945).[15] Further, 29 C.F.R. § 778.114 payplans are designed for those non-exempt workers who need the security of a consistent, guaranteed paycheck and are willing to forego their statutory right to time and one-half overtime for that security.

Of the six plaintiffs, five had small children at the time they worked for Apollo and three were single fathers who had custody of their children. They were doing their best to support their children without welfare and the guaranteed and consistent salary was critical to their financial survival. These plaintiffs gave up tens of thousands of dollars in time and one-half overtime in return for the promise of a guaranteed salary. These employees counted on the security of a guaranteed salary when they had to miss work due to illness or personal business, but Apollo still took improper deductions in weeks where 40 hours were not worked.[16] These working parents were held hostage in their employment by Apollo because, given their family financial obligations, they could not quit before they secured a replacement job, and averaging 60 hours per week for

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[15] These types of workers do not have specialized skills, like white-collar workers, so an employer can easily fire and replace them with another requiring little or no additional training.

[16] Apollo's own expert described this as the employer "wanting its cake and eating it too" because the employer did not want to have to pay time and one-half for overtime work but yet was unwilling to pay the full guaranteed weekly salary when the employee could not work 40 hours.

Apollo left little time to look for another job.

Through the FLSA and other statutes, Congress and this Court have unequivocally stated that the plaintiffs herein are the types of workers they want the lower courts to protect from unscrupulous employers. The circuit court failed to acknowledge the mandates of Congress and this Court. If the courts refuse to uphold Congress' clear intentions, employees will be forced to turn to unions as their sole source of protection from employers who fail to follow Congress' mandates. With more union employment agreements, the courts will lose their power of influence and interpretation over many of our country's employment laws because wage and hour issues will be governed by the applicable union contract and not Federal statutory and regulatory laws.

B. The Fifth Circuit's Decision Gives An Unfair Advantage To Those Employers Who Fail To Abide By The Restrictions Of 29 C.F.R. § 778.114 Over Those Employers Who Follow The Spirit of Congress As Enunciated In The FLSA And This Court In *Overnight Motor*

In addition to protecting employees, the FLSA's enforcement mechanisms are also meant to "deprive a violator of any gains accruing to him through his violation" and "to protect those employers who comply with the Act's wage requirements from having to compete unfavorably with those who fail to comply." *Donovan v. Brown Equip. & Service Tools, Inc.*, 666 F.2d 148, 157 (5th Cir. 1982). "It is clear that the Fair Labor Standards Act was meant to protect compliant employers," *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 810 at FN 23 (D.C.Cir. 1983), and "Congress passed the Act partly to provide redress to employers from unfair competition." *Id.* at 811-12.

Plaintiff Melvin Smith testified that one of Apollo's

competitors, Safeguard Disposal Systems, his current employer, pays overtime rates of $24 per hour to employees who make $16 per hour regular time. Trial Transcript p. 863, ln. 7-19 (vol. 20). At the same time, under the fluctuating workweek formula, Apollo paid similar employees overtime rates, pursuant to the fluctuating workweek formula, ranging from a high of $7.80 (41st hour) down to $1.29 (100th hour).

Apollo gained an unfair competitive advantage over its competition by misapplying the 29 C.F.R. § 778.114 regulations and the DOL interpretations governing that payplan. Using the above paygrades, for a typical 84-hour week of work on an offshore oil rig, Safeguard paid its employee $1696.00 while Apollo paid only $807.62.

V.
CONCLUSION

In this case, the Court of Appeals has so far departed from the accepted and usual course of judicial proceeding, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The *Overnight Motor* decision and DOL's 29 C.F.R. § 778.114 payplan were meant to cover only a small class of employment situations and imposed very specific requirements for its use. However, the circuit court's decision effectively eliminates the guaranteed-salary requirement mandated by this Court and the DOL and impermissibly allows the employer to expand the use of 29 C.F.R. § 778.114 payplans beyond that contemplated by this Court and the DOL. As such, if left unchecked, this decision, along with decisions from other circuits, have the power of undoing the overtime provisions of the Fair Labor Standards Act that are currently a fixture of compensation systems for blue-collar workers.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

/s/ _____

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

[Decided February 20, 2001]

Nos. 99-30304, 99-30306 and 99-30407

George C. SAMSON, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants
v.
APOLLO RESOURCES, INC., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

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Lester D. Weaver; Crawford R. Norton,
Plaintiffs-Appellants
v.
Apollo Resources, Inc., doing business as Apollo Services, Inc.,
Defendant-Appellee

****

George C. Samson, III, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants
v.
Apollo Resources Inc., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

Appeals from the United States District Court
for the Western District of Louisiana
No. 97-1053–Richard T. Haik, Sr., *Chief Judge*
Mildred E. Methvin, *Magistrate Judge*

Before KING, Chief Judge, PARKER, Circuit Judge, and FURGESON, District Judge. [1]

OPINION

FURGESON, District Judge:

This case involves a dispute over the applicability and administration of the Fluctuating Workweek ("FWW") method for calculating employees' salaries and overtime wages. We review the district court's judgment rendered for the Defendant in a non-jury trial pursuant to Fed.R.Civ.P. 52(c). For the reasons stated herein, we affirm.

FACTS

The Plaintiffs--George C. Samson, Jackie D. Hays, Brent C. Manuel, Kevin D. Smith, Norman J. Landry, and Melvin K. Smith--are former employees of the Defendant Apollo, Inc. ("Apollo"). Apollo is an oilfield services company based in Louisiana. Its president and sole shareholder is Jeffrey A. Reddoch, who is also named as a defendant in the suit. Plaintiffs worked on Apollo's offshore rigs as well as in its yard. During their employment, they were paid under a fluctuating workweek ("FWW") or sliding-scale method. This method is used primarily by employers whose employees may

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[1] District Judge of the Western District of Texas, sitting by designation.

be called upon to work a fluctuating number of hours each week. Apollo adopted the FWW method in 1991-- after consultation with Don Strobel, then an Assistant District Director of the Wage and Hour Division of the Department of Labor ("DOL")--as a means of complying with the Fair Labor Standards Act ("FLSA") and meeting its own employment needs.

Under Apollo's policy, the employees received a fixed monthly wage plus a weekly overtime premium for each hour worked over forty. Unlike the standard "time and one-half" overtime premium, Apollo calculated the overtime premium by first dividing the monthly wage amount by 4.3 to arrive at the fixed weekly wage. Then each employee's weekly wage was divided by the actual number of hours worked by that employee for that particular week. This figure represented the employee's "regular rate of pay"[2] for that workweek. Under this method, the "regular rate of pay" fluctuates from week to week depending on the actual number of hours worked by the employee. Apollo then paid the employee an additional one-half of that workweek's regular rate of pay for each hour worked over forty as an overtime premium. In other words, the employees received a fixed salary for all hours worked in any workweek plus one-half times the regular rate of pay for all hours worked over forty in that workweek. As part of its administration of the FWW method, Apollo made deductions from an employee's fixed salary in workweeks where the employee was willfully not available for work. These

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[2] For example, if an employee works 60 hours in a given week and his fixed weekly salary is $500, then his "regular rate of pay" per hour is $8.33 for that week. If the employee works 50 hours in a given week and his fixed weekly salary is $500, then his "regular rate ofpay" per hour is $10 for that week.

deductions, however, were taken only when the employee had not yet worked forty hours in that workweek.

PROCEDURAL HISTORY

Originally, twenty-six plaintiffs brought suit against Apollo under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., the Louisiana Wage Statute, La.Rev.Stat. Ann. § 23:631 and § 23:632, and general employment contract law. They complained that Apollo's use of the FWW method, pursuant to 29 C.F.R. § 778.114, was unlawful because the employees frequently worked more than sixty hours in a week without receiving an additional overtime premium. The employees further claim that even if Apollo was allowed to use the FWW method, Apollo improperly administered the plan (1) by failing to meet the "clear mutual understanding" provision prior to implementing the plan as required by § 778.114 and (2) by taking wrongful deductions from their wages. Plaintiffs claim back wages and damages as a result.

Prior to trial, Apollo filed a motion in limine to restrict the introduction of evidence regarding non-employment business practices of Apollo and its owners, Jeffrey and Chiquita Reddoch. The trial court granted Apollo's motion in limine. In addition, the parties stipulated that the case would be severed after the completion of all testimony and evidence as to six of the Plaintiffs--Samson, Hays, Manuel, Smith, Landry and Smith--and that all remaining proceedings would be stayed. The case then proceeded to a bench trial. At the close of Plaintiffs' case-in-chief, Apollo moved for judgment under Fed.R.Civ.P. 52(c). The trial court granted Apollo's motion in favor of Apollo on all of the claims, determining that Apollo did not violate the FLSA, the Louisiana Wage Statute or any general contract law. The Plaintiffs timely appealed.

The Plaintiffs raise numerous points of error on appeal. These points present four main issues: (1) whether Apollo may utilize the FWW method to pay its employees when the employee works more than sixty hours in a given week but does not receive an additional overtime premium (above one-half the regular rate); (2) even if Apollo may properly use the FWW method, whether it was properly administered by the company; (3) what damages, costs, and attorney's fees are Plaintiffs entitled to, if any; and (4) whether the district court erred in granting Apollo's motion in limine.

STANDARD OF REVIEW

Judgment entered under Rule 52(c) is made after the district court has heard all of the "evidence bearing on crucial issues of fact." Fed.R.Civ.P. 52(c) advisory committee's notes. Findings of fact made pursuant to a Rule 52(c) judgment are reviewed only for clear error. *Southern Travel Club v. Carnival Air Lines, Inc.*, 986 F.2d 125, 128 (5th Cir.1993). When the findings of fact are based on determinations regarding the credibility of witnesses, Rule 52 demands "even greater deference to the trial court's findings." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The trial court's conclusions of law, however, are reviewed *de novo*. *Ivy v. Jones*, 192 F.3d 514 (5th Cir.1999). Evidentiary rulings are reviewed for"abuse of discretion." *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir.1994).

DISCUSSION

The Fair Labor Standards Act generally requires that employees be paid an overtime premium of "time-and-one-half"

for all hours worked in excess of forty hours in a week. 29 U.S.C. § 207(a). The Department of Labor provides to employers various methods for calculating overtime compensation to suit different employment needs while still complying with § 207(a). One such method is the Fluctuating Workweek method. 29 C.F.R. § 778.114 (stating the guidelines governing the use of the FWW method). Under the FWW method, the employee receives a fixed salary as compensation for all hours worked by the employee, whether above or below forty hours, as well as an additional overtime premium for each overtime hour. *Id.* § 778.114(a). The overtime premium is calculated by dividing the fixed weekly salary by the number of hours that the employee actually works in a particular week to yield the employee's "regular rate of pay." *Id.* The employee is paid an overtime premium of one-half his regular rate of pay for each overtime hour. This premium is in addition to his fixed weekly salary. Under the FWW method, the employee is effectively earning time-and-a half as overtime pay. However, his hourly wage and the actual amount of overtime pay he earns decreases the more hours that he works. The fixed salary must be sufficient to provide compensation at regular rate meeting the minimum wage requirement of 29 U.S.C. § 206(a)(1), and the overtime premium cannot be less than one-half the regular rate of pay. 29 C.F.R. § 778.114(c). *Condo v. Sysco Corp.*, 1 F.3d 599, 601 (7th Cir.1993), *cert. denied*, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994); *Cash v. Conn Appliances, Inc.*, 2 F.Supp.2d 884, 893 (E.D.Tex.1997).

I. May an employer use the FWW method when the employee works more than sixty hours in a given week without paying the employee an additional overtime premium?

The Plaintiffs contend that the trial court erred in determining that the FWW method may be used when an employee works more than sixty hours in a week and no additional overtime premium (above one-half the regular rate) is paid for those hours worked over sixty. Because this issue raises a question of statutory interpretation and application and this is a question of law, we review the district court's ruling on this issue *de novo*.

29 C.F.R. § 778.114(c) states, in relevant part, that:

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

From this provision, the Plaintiffs extrapolate the contention that if an employee works in excess of sixty hours in a workweek, then the employer must pay the employee an overtime rate of more than the one-half the regular rate of pay minimally required by § 778.114(a). Otherwise, as Plaintiffs argue, the rate of pay for each overtime hour (including the overtime premium) is less than the rate of pay for nonovertime hours, in violation of § 778.114(c). This arguments turns on the definition of the rate of pay for nonovertime hours.

The Plaintiffs assert that dividing the fixed weekly salary by forty hours yields the rate of pay for nonovertime hours referred to in the last sentence of § 778.114(c). This contention rests on the assumption that the hourly rate for nonovertime hours is determined by dividing the fixed weekly salary by forty hours. Under this assumption, after sixty hours, the rate of pay for each overtime hour is less than the rate of

pay for each hour that the employee would have received if he had worked only forty hours.

To illustrate, under the FWW method, an employee who is paid a salary of $500 a week and who works only forty hours, effectively makes $12.50 per hour.[3] In a week where the employee works sixty hours, the overtime rate for hours forty-one to sixty is $12.50 per hour ($8.33 an hour "regular rate,"[4] plus $4.17 per hour as overtime premium[5]). In a sixty-one hour week, however, the employee's overtime rate drops to $12.30 an hour for hours forty-one through sixty-one ($8.20 per hour as "regular rate," plus $4.10 per hour overtime premium). When the employee works eighty hours in a week, the overtime rate drops to $9.38 ($6.25 at hour as "regular rate," plus 3.23 as an overtime premium). As these examples show, under the Plaintiffs' model, the more hours that an employee works, the lower his rate of pay per overtime hour becomes. After sixty hours, unless an overtime premium of greater than one-half the regular rate is paid, the rate of pay for overtime hours is no greater (but is actually less) than the rate of pay that the employee would receive if he had worked no overtime at all, i.e., if he only worked forty hours.

The Plaintiffs assert, therefore, that § 778.114(c) should be read as prohibiting the use of the FWW method for weeks where the employee works over sixty hours without receiving more than one-half the regular rate as the overtime premium because in such weeks the "employee is being paid for overtime

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[3] $500/40 hours = $12.50 per hour.

[4] Regular rate = fixed weekly salary ($500) divided by total hours worked (60).

[5] The minimally required overtime premium is one-half the regular rate of pay for that week.

hours at a rate not greater than that which he receives for nonovertime hours." 29 C.F.R. § 778.114(c). Though the Plaintiffs' interpretation is facially appealing, it is an incorrect reading of section 778.114(c) and the principles of the FLSA.

Section 778.114(a) makes clear that the fixed weekly salary compensates the employee for all hours worked, including overtime hours. Therefore, since the employee already receives 100 % of his regular rate of pay for each overtime hour worked, the time and one-half overtime provision of 29 U.S.C. § 207(a)(1) requires that the employee receive only an additional 50% of his regular rate for each overtime hour. *Condo v. Sysco Corp.*, 1 F.3d 599, 605 (7th Cir.1993).

The fallacy of the Plaintiffs' reading of § 778.114(c) lies in their interpretation of the rate of pay for nonovertime hours. Under the Appellant's model, the rate of pay for nonovertime hours erroneously includes overtime wages already built into the fixed salary. As § 778.114(c) makes clear, the fixed salary paid under the FWW method is not intended as compensation only for the forty hours traditionally recognized as nonovertime hours but for all "hours worked each workweek, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a). Accordingly, the fixed weekly salary necessarily includes compensation intended for overtime hours. *See id.* (noting that the FWW method complies with the overtime pay requirement of 29 U.S.C. § 207(a)(1) because overtime hours "have already been compensated at the straight time regular rate").

If a fixed salary includes a premium for overtime hours, then this premium must be deducted before calculating the rate of pay for nonovertime hours so that the actual rate of pay for nonovertime hours is not inflated by the overtime premium. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464, 463-64,

68 S.Ct. 1186, 92 L.Ed. 1502 (1948) ("When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay."). As such, Plaintiffs' calculation of the rate for nonovertime hours is artificially high because it includes compensation intended for overtime hours. In order to accurately compare the nonovertime hourly rate of pay to the overtime hourly rate of pay, the portion of fixed salary intended as payment for overtime must be deducted. 29 C.F.R. § 778.114(a).

A reading of § 778.114 suggests that rather than requiring employers to calculate and deduct the overtime premium on a week to week basis for all their employees for the purpose of determining compliance with the overtime requirement, § 778.114 is a *fait accompli*. That is, so long as the regular rate of pay does not fall below the minimum hourly wage requirements, "[p]ayment for overtime hours at one-half [the regular rate] in addition to the salary satisfies the overtime pay requirement" regardless of whether or not they exceed sixty hours. 29 C.F.R. § 778.114(a); *See Aaron v. City of Wichita, Kansas*, 54 F.3d 652, 657 (10th Cir.1995); *see also Flood v. New Hanover County*, 125 F.3d 249, 252 (4th Cir.1997) ("Since the employer has already paid the employee a regular rate of pay for all of the hours that the employee worked, including the overtime hours, it only has to pay an additional one-half time pay premium for the overtime hours.").

If § 778.114(a) already states the overtime pay requirement is satisfied when the employee is paid one-half times the regular rate for overtime hours in addition to the fixed salary, then what is the proper interpretation of the last sentence of § 778.114(c)?

[W]here all the facts indicate that an employee

> is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot rely on any application of the fluctuating workweek method.

29 C.F.R. § 778.114(c). According to the Plaintiffs, this sentence of § 778.114(c) prohibits the employer from using the FWW method for weeks where the employee works over sixty hours and does not receive more than one-half the regular rate as the overtime premium in addition to the fixed salary. Any other interpretation, the Plaintiffs contend, would render the last sentence of § 778.114(c) surplusage.

A more likely reading of § 778.114(c), however, is that an employer cannot apply the overtime hours that an employee works in one week to another week in the same pay period where the employee works less than forty hours in order to avoid paying the overtime premium. The FWW method and the FLSA determine whether overtime pay is required by examining the number of hours worked in an individual week. Employers, however, may issue pay checks on a bi-weekly or monthly basis--commonly referred to as the "pay period." Therefore, rather than being surplusage, § 778.144(c) is meant to ensure that an employee is always paid an overtime premium for each hour worked over forty hours in a given week, regardless of the number of hours worked in earlier, or later, weeks within the same pay period. *See Cash*, 2 F.Supp.2d at 895 n. 24 (holding that section 778.114(c) is meant to prohibit the practice of cutting salary for a week in which less than forty hours is worked in order to counterbalance compensation for hours over forty worked in another week of the same pay period).

The Court finds that the FLSA and 29 C.F.R. §

778.114(c) does not prevent an employer from using the FWW method where the employee works over sixty hours and the overtime premium paid is not more than 50% of his regular rate.

II. Was the FWW method properly administered by Apollo?

The Plaintiffs assert that the trial court erred in its finding that Apollo properly administered the FWW method. First, they argue that the trial court erred in finding that the "clear mutual understanding" prerequisite was met. Second, the Plaintiffs contend that the deductions made to their salaries violated federal and/or Louisiana state law. The Court is unpersuaded by these arguments and affirms the district court's rulings.

A. Burden of Proof

Generally, a plaintiff suing under the FLSA carries the burden of proving all elements of his or her claim. In a suit for the payment of overtime wages, the employer claiming that the suing employee is exempt from the overtime requirement has the burden of proving that the employee falls within the claimed exempted category. *Dingwall v. Friedman Fisher Assoc.*, 3 F.Supp.2d 215, 218 (N.D.N.Y.1998). This Court has never directly addressed the issue of which party--whether the employer or the employee--has the burden of proving compliance with the requirements of the FWW method. We hold that the employee has this burden.

As its name implies, the FWW method is one method of complying with the overtime payment requirements of 29 U.S.C. § 207(a)(1). It is not an exemption to it. See 29 C.F.R.

§ 778.2 (noting that the subpart of 778, which includes the FWW method, does not discuss any specific exemptions to the overtime or minimum wage payment requirements of the FLSA); *Griffin v. Wake County*, 142 F.3d 712, 715 (4th Cir.1998); but *see Dingwall v. Friedman Fisher Assocs.*, 3 F.Supp.2d 215, 221 (N.D.N.Y.1998) (determining that the FWW is "an exception to the normal rights of the employee and thus the employer bears the burden of proving that all the requirements for applying the method are present"). Therefore, the employee bears the burden of proving that the employer failed to properly administer the FWW method. *Cash*, 2 F.Supp.2d at 896 ("The employee alleging an improper application of the fluctuating workweek method bears the burden of proof.").

B. Clear Understanding Requirement

The Plaintiffs contend that the trial court erred in finding that the "clear understanding" criterion required by § 778.114 was met. They assert two points here. First, they claim that Apollo misrepresented the number of hours that the employees would be called upon to work, specifically that Apollo made misrepresentations about comparable amounts of time off. For example, they argue that Apollo told employees that if an employee was required to work five days on the rig, then he would get a comparable five days off the rig. Second, the Plaintiffs assert that Apollo failed to disclose that it was not obligated to pay the employees the fixed salary for weeks in which the employee was not called upon to work at all. They argue that they could not have formed the clear understanding of the FWW method as a matter of law given these misrepresentations.

Again, these arguments are unpersuasive. Section

778.114 is specific as to what the employee must understand before the FWW method may be used. It only requires that "[t]here is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period." 29 C.F.R. § 778.114(a); 29 C.F.R. § 778.114(c) (prohibiting the use of the FWW method "unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked"); *see, e.g., Griffin*, 142 F.3d at 716 (reading the clear understanding requirement as only encompassing the fact that the fixed salary was compensation for all hours that the employee worked); *Cash*, 2 F.Supp.2d at 907 (adopting and applying this standard of the clear mutual understanding requirement). We decline to expand the "clear understanding" requirement of section 778.144 to include the details cited by the Plaintiffs. *See, e.g., Griffin*, 142 F.3d at 717 (finding that the FLSA does not require that the "employer hold an employee's hand and specifically tell him or her precisely how the payroll system works"). Section 778.114 does not require that the employee know the hours expected to be worked, that the fixed salary is not be paid for weeks where the employee performs no work, or any other details of how the FWW is administered. *Bailey v. County of Georgetown*, 94 F.3d 152, 156 (4th Cir.1996) (determining that neither section 778.114 nor the FLSA "in any way indicates that an employee also must understand the manner in which his or her overtime pay is calculated").

In addition, even taking into account the misrepresentations alleged by the Plaintiffs, the Court finds no basis for disturbing the trial court's finding that the "clear

mutual understanding" criterion was satisfied. These allegations of misrepresentation were already considered by the trial court and soundly rejected. In fact, the trial judge determined that Apollo went above and beyond what was required by § 778.114. The evidence in the record indicates that Apollo took the necessary steps to explain the FWW method to employees. The record is replete with testimony that Kelly Boudreaux and Ben Stonecipher explained to the Plaintiffs that they would be paid a fixed salary regardless of the hours that they were called on to work. In certain instances, Boudreaux and Stonecipher used formula sheets to illustrate this point. After hearing this testimony and weighing the credibility of the testimony, the district judge found that Apollo took every opportunity to explain the fixed salary provision of the FWW method to the Plaintiffs. The evidence shows that the Plaintiffs did have or should have had a clear understanding that they would be paid a fixed salary under the FWW method. And Plaintiffs cite to nothing in the record sufficient to show that the trial court's findings were clearly erroneous. To the contrary, the evidence in the record adequately supports the trial court's findings that Apollo met the clear understanding requirement.

C. Did Apollo improperly administer the FWW method by taking deductions from the employees' fixed salaries for willful absences?

1. Louisiana State Law

Plaintiffs next argue that the trial court erred in finding that Apollo's practice of making deductions from the employees' salaries for willful absences was allowed by federal and state law. Plaintiffs point to La.Rev.Stat. Ann. § 23:635. Section 23:635 states, in relevant part, that:

> No person, acting either for himself or as agent or otherwise, shall assess any *fines* against his employees or deduct any sum *as fines* from their wages.

La.Rev.Stat. Ann. § 23:635 (West 1999) (emphasis added). Because § 23:635 is penal in nature, Louisiana jurisprudence requires that it must be strictly construed. *See, e.g., Hanks v. Shreveport Yellow Cabs*, 187 So. 817, 819 (La.App.1939).

As this statute makes clear, not all deductions are prohibited; only fines or deductions made as fines are prohibited. The term "fines" has a very specific and limited meaning. "A fine, within the meaning of [section] 23:635, is a pecuniary penalty imposed for the violation of some law, rule or regulation." *Brown v. Navarre Chevrolet, Inc.*, 610 So.2d 165, 170 (La.App. 3rd Cir.1992). The few cases discussing § 23:635 restrict employers from levying fines on the employee (via deductions from wages) for failing to follow workplace procedures and regulations. *Brown*, 610 So.2d at 168, 170 (finding that deductions made because employee arrived late for meetings, and parked company car in wrong place were fines and, therefore, prohibited by § 23:635); *Stoll v. Goodnight Corp.*, 469 So.2d 1072, 1077 (La.App. 2 Cir.1985) (determining that requiring employee to reimburse employer for bad checks written by customers was not a fine where agreement existed between parties that employee would cover such losses); *Hanks*, 187 So. at 819 (holding that employer's charges against driver-employee for damages to a cab were not fines because the charge was used to cover cost of repair to cab and employee agreed to be responsible for such damage).

Under a strict construction of the term fines, the deductions made by Apollo for willful absences or tardiness do not constitute a fine so as to be prohibited by Louisiana law.

The deductions were not "arbitrarily fixed and assessed" as punishment against the employee for violating a work place rule or regulation. *Hanks*, 187 So. at 819 (clarifying the characteristics that distinguish a fine from a lawful deduction). Rather than acting as a fine or punishment, the deductions allowed Apollo to avoid paying an employee for wages to which he was not otherwise entitled. While failing to show up for work when called is certainly a "violation" of a workplace "rule" requiring attendance, no authority exists in either § 23:635 or 29 C.F.R. 778.114 requiring the employer to pay employees for times which the employee intentionally skips work. Therefore, § 23:635 did not prohibit Apollo from making deductions from the Plaintiffs' salaries for willful absences.

2. Federal Law

Section 778.144 itself is silent on the issue of whether such deductions are permissible under the FWW method. The Plaintiffs' only support for their contention that deductions are not permitted under the FWW method is DOL interpretive letter No. 479, written in 1966. Letter No. 479 states, in relevant part, that "[d]eductions for less than a week, whether for illness, personal business, or other reasons, may not be made under [the FWW] method of compensation." Later DOL opinion letters and materials, however, state otherwise. DOL Opinion Letter No. 988, written in May 1969, states that under the FWW method "occasional disciplinary deduction for wilful absence or tardiness may be made." This letter tracks the language of the DOL's Field Operations Handbook, published in 1967, regarding disciplinary deductions under the FWW method. The 1967 Handbook recognizes that an employer may make "occasional disciplinary deductions for wilful absence or

tardiness." Department of Labor, Field Operations Handbook § 320b04b (1967). Furthermore, a 1982 letter--referred to as the Otter Letter--states that "[o]ccasional deductions may be made [from an employee's salary] as a disciplinary measure for willful absence or tardiness." The problem here is resolving which of the conflicting DOL pronouncements should apply. When faced with an issue involving statutory construction, federal courts show "'great deference to the interpretation given the statute by the officers or agency charged with its enforcement.'" *Biggs v. Wilson*, 1 F.3d 1537, 1543 (9th Cir.1993) (*quoting Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)). Interpretive and opinion letters by the Department of Labor do not *per se* bind the court. Such materials, however, do "constitute a body of experienced and informed judgment" and the court will give these materials "substantial weight." *Flood*, 125 F.3d at 253 (citation omitted).

The Plaintiffs correctly point out that the 1969 and 1982 letters are unpublished pronouncements of the DOL's interpretation of the FWW method. They further contend that since the letters are unpublished this Court should not rely upon them. But the fact that they are unpublished does not dismiss entirely the persuasive value and insight that they may provide this Court, especially in light of their consistency with the Field Operation Handbook. Unpublished opinion letters by a government agency still reflect the agency's interpretation and intended application of the regulation. The Court finds that the survey of the available material from the DOL indicates that occasional deductions for wilful absence or tardiness are not prohibited under the FWW method. *See Cash*, 2 F.Supp.2d at 895 ("[The FWW method] however, in no way bars 'occasional' deductions from salary for 'wilful absences or tardiness,' so long as the full salary figures in the calculation of the regular rate and the amount of salary remaining after such reductions

supports an average hourly rate at least equal to the applicable minimum wage.").

In addition, deductions for willful absences or tardiness do not run afoul of the guidelines governing the FWW method. The central feature of the FWW method is that the fixed salary is "straight time pay for whatever hours [the employee] is called upon to work in a workweek." 29 C.F.R. § 778.114(a). This does not mean, however, that the employer must pay the full salary even though the employee decides not to work all the hours that he is called upon to work. To hold otherwise would allow for a tremendous abuse of the FWW method by employees. Beyond Interpretive Letter No. 479, which the Court finds unpersuasive in light of later pronouncements by the DOL, the Plaintiffs provides no support for its argument that deductions for willful absences is not allowed under the FWW method.

The Plaintiffs further argue that even if "occasional deductions" are permitted, the deductions made by Apollo were improper because they were made without adequate investigation or when the employee was not actually wilfully absent or tardy. Again, the Court finds no basis to reverse the district court's careful findings of fact on this issue. In each instance, it found that the employee in question had been wilfully absent, that Apollo had adequately investigated the circumstances surrounding the employee's absence, and that Apollo was justified in making the deductions. These conclusions were made in large part based on the district court's assessment of the credibility of the witnesses and the Plaintiffs. In fact, the court emphasized that the testimony of the Plaintiffs appeared contrived, orchestrated, and wholly unbelievable. As such, we give the determination even greater deference. Nothing in the record indicates that these findings were clearly erroneous.

III. Are the Plaintiffs entitled to attorney's fees, penalties, or liquidated damages under either federal or Louisiana state law?

Even though they were unsuccessful on all of their claims, the Plaintiffs contend that they should be awarded attorney's fees, penalties, and liquidated damages under federal and state law. Their argument is predicated on the fact that Apollo tendered checks totaling $487.89 to five of the Plaintiffs midway through the trial. Ostensibly, these checks were payment for hours worked by the employees, but which the Plaintiffs claimed Apollo failed to credit. The Plaintiffs argue that these payments amount to an admission of liability on those claims for backpay. As a result of this implied admission, Plaintiffs contend that they are due attorney's fees, penalties, and liquidated damages under federal and Louisiana state law. The Court disagrees.

The trial record and relevant case law clearly indicate that Apollo's payments did not constitute any admission of liability. The record makes clear that Apollo tendered payment in order to avoid an additional day and a half of trial that would have been needed to adjudicate the claims for uncredited overtime hours. In making the payments, Apollo made clear that the payments were not an admission of any liability or waiver of any defenses. The Plaintiffs likewise stipulated that their receipt and acceptance of the payments did not in any way dispose of or otherwise decide the merits of their claims for the uncredited overtime hours. Clearly, both parties agreed that Apollo's payment in no way determined the merits of the Plaintiffs' claim.

The Court finds no reason to disregard the express stipulation and agreement of the parties and to now infer an admission of liability on the part of Apollo. *McCloskey v.*

Eckart, 164 F.2d 257, 259 (5th Cir.1947) (refusing to infer that overtime wages were owed by the employer from the fact that the employer made a compromise settlement payment on this claim but expressly stipulated that payment was not an admission of liability). The district court found for Apollo on all of the Plaintiffs' claims. It found that Apollo did not violate the FLSA, Louisiana law or general contract law either by using the FWW method or in its administration of it. Without any admission of liability from Apollo, the Plaintiffs' arguments for attorneys fees, liquidated damages, and penalties quickly lose all merit.

A. Attorney's fees

Despite their failure to prevail on any of its claims, the Plaintiffs assert that because they were forced to file suit before Apollo made payment for uncredited time, an award of attorney's fees is appropriate under 29 U.S.C. § 216(b) and La.Rev.Stat. Ann. § 23:632. However, this contention misapplies both of these statutes. First, 29 U.S.C. § 216(b) allows an award of attorney's fees only "in addition to any judgment awarded to the plaintiff." Here, attorney's fees are not available because the Plaintiffs failed to prevail on any of their claims. Similarly, under § 23:632, an award of reasonable attorney's fees is mandatory when an employee brings a "well-founded" suit for unpaid wages. A suit is "well-founded" only if the employee receives a judgment in his favor. *See Hebert v. Insurance Ctr. Inc.*, 706 So.2d 1007, 1014 (La.App. 3rd Cir.1998); *Loup v. Louisiana State Sch. for the Deaf*, 729 So.2d 689, 694 (La.App. 1st Cir.1999) ("Suits in which the recovery of back wages is *granted* are considered 'well-founded.' ") (emphasis added); *Byrnes v. Orkin Exterminating Co.*, 562 F.Supp. 892, 894 (E.D.La.1983)

("Because no wages have been found to be due, this claim cannot be considered a 'well-founded' suit."). Clearly, under Louisiana law, Plaintiffs are not entitled to attorney's fees under § 23:632 since they did not bring a "well-founded" suit as evidenced by their failure to prevail on any of their claims.

B. Liquidated Damages

If it is found that the employer failed to properly pay wages to its employees, the employer may be liable for liquidated damages in an amount equal to the amount of unpaid wages. 29 U.S.C. § 216(b). An employer may still avoid liquidated damages if the employer shows that he acted in good faith and that he had reasonable grounds for believing that he was not acting in violation of the FLA. 29 U.S.C. § 260. It is within the sound discretion of the trial court whether or not to award liquidated damages in the event of a good faith showing by the employer. 29 U.S.C. § 260. Plaintiffs fail to show that the trial court abused its discretion in not awarding them liquidated damages.

First, the trial court ruled that Apollo did not violate either the FLSA, Louisiana law or general contract law. Plaintiffs failed to make the predicate showing that Apollo failed to properly pay wages to the Plaintiffs. Even if this Court assumes *arguendo* that Apollo violated the FLA., the district court found that Apollo was acting in good faith and, in its discretion, decided not to impose liquidated damages. The record supports a finding that Apollo had reasonable grounds to believe that it was complying with the FLSA. For instance, unlike the cases cited on by the Plaintiffs where liquidated damages were found warranted because the employer failed to change its policy after it became aware of its violations, Apollo took affirmative steps to comply with the FLSA. It consulted

with the DOL, specifically with Don Strobel, the Assistant Director for the DOL, to devise a salary scheme that would comply to all the relevant provisions of the FLSA. It was after this consultation that Apollo implemented the FWW method. The trial judge made the expressed determination that Apollo made every reasonable effort to comply with the overtime requirements of the FLA. The DOL investigations cited by Plaintiffs never led to an actual finding of a violation of the FLA. Rather, the investigations only led to a letter being sent to Apollo's employees informing them that they might have a claim for back wages. Given the evidence on the record, the Plaintiffs fail to show that the trial court was clearly erroneous in deciding not awarding liquidated damages. *See Lee v. Coahoma County, Miss.*, 937 F.2d 220, 226-27 (5th Cir.1991)("If the district court finds that employer's action which violated the FLSA was taken in good faith, which good faith was supported by reasonable grounds for believing that the actions complied with the FLSA, it may choose not to award liquidated damages.").

C. Penalty Wages

In order to recover penalty wages under La.Rev.Stat. Ann. § 23:632, the employee must prove (1) that wages were due and owing, (2) that a demand for payment was made at the place where the employee is usually paid, and (3) that the employer failed or refused to pay after the employee's demand. *Hughes v. Cooter Brown's Tavern, Inc.*, 591 So.2d 1334, 1337 (La.App. 4th Cir.1991). Because it is a penal statute, section 23:632 is strictly construed. *Id.* Plaintiffs are not entitled to penalty wages because they failed to make the requisite showing under § 23:632. As noted above, Plaintiffs never established that back wages were owed to them by Apollo and

such proof cannot be implied from Apollo's tender of payments to some of the Plaintiffs.

IV. Motion in Limine

The Plaintiffs' final argument on appeal is that the district court erred in excluding from trial impeachment evidence. Specifically, the Plaintiffs sought to introduce evidence regarding alleged environmental violations by Apollo, improper tax deductions made by Apollo and its owners, and Apollo's violation of local building codes. None of these alleged incidents led to any formal conviction. Plaintiffs claim that the excluded evidence would have called the credibility of several of Apollo's witnesses into question. This Court reviews a trial court's evidentiary rulings for abuse of discretion. *Townsend*, 31 F.3d at 267. Fed.R.Evid. 608(b) states:

> Specific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided by rule 609, may not be proved by extrinsic evidence.

By its language, Rule 608(b) clearly prevents the Plaintiffs from presenting evidence of specific instances of untruthful conduct by certain Apollo witness to show that these witnesses had a propensity for untruthfulness. 28 Charles Alan Wright & Victor James Gold, Federal Practice And Procedure § 6117 (1993) (recognizing that under the proper application of Rule 608(b) extrinsic evidence of specific instances of bad conduct is made inadmissible when offered to prove a witness's character for untruthfulness). In addition, Fed.R.Evid. 403 allows the district court to exclude relevant evidence if "its

probative value is substantially outweighed ... by considerations of undue delay [or] waster of time." Here, the district court found that the evidence had little probative value to the issue of the witnesses' credibility and virtually no relevance to the material issues in the case. In addition, proof of these collateral issues would have likely required many additional days of testimony without shedding any light on the central issue of the case--Apollo's use of the FWW method. In light of Rules 403 and 608(b), even if the evidence that Plaintiffs wished to introduce may have been relevant in determining the credibility of Apollo's witnesses, the district court's decision to exclude the evidence did not amount to "manifest error" so as to constitute an abuse of discretion. *United States v. Williams*, 822 F.2d 512, 517 (5th Cir.1987) ("The district court may under Rule 608(b) determine if evidence is probative of truthfulness, and under 403 exclude even probative evidence if the prejudicial effect outweighs the probative value."); *cf. United States v. Miller*, 91 F.3d 1160,1163 (8th Cir.1996) (affirming district court's ruling to exclude evidence that witness alleged bribed police officer, which was unrelated to the charged offense).

CONCLUSION

Consolidated with this appeal are several appeals and motions. In light of the consolidation of the appeals and the Court's above opinion, Appellants' appeals of the district court's rulings on the motion in limine and on the motion for partial summary judgment along with Appellee's Motion to Dismiss these two appeals are DENIED as moot. In addition, Appellants' motion for attorney's fees and sanctions is DENIED.

For the above stated reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed March 20, 2001]

Nos. 99-30304, 99-30306 and 99-30407

George C. SAMSON, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants

v.

APOLLO RESOURCES, INC., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

****

Lester D. Weaver; Crawford R. Norton,
Plaintiffs-Appellants

v.

Apollo Resources, Inc., doing business as Apollo Services, Inc.,
Defendant-Appellee

****

George C. Samson, III, et al.
George C. Samson, III, et al.
Plaintiffs-Appellants

v.

Apollo Resources Inc., doing business as Apollo Services, Inc.; et al.,
Defendants-Appellees

Appeal from the United States District Court for the
Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING

Before KING, Chief Judge, and PARKER, Circuit Judge, and GURGESON, District Judge *

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/
Carolyn Dineen King
United States Circuit Judge

* District Judge of the Western District of Texas, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Judgment Entered April 28, 1999]

George C. Samson, III, et al *Plaintiffs*	Civil Action No.: 97-1053
v.	
Apollo Resources, Inc., d/b/a Apollo Services, Inc. et al. *Defendants*	Judge Haik Magistrate Judge Methvin

JUDGMENT

This matter was tried before the Court as a bench trial beginning on March 1, 1999 and ending on March 9, 1999. Present at trial were:

William L. Melancon on behalf of the Plaintiffs and

Timothy J. McNamara and Steven C. Lanza on behalf of the Defendants, Apollo Resources, Inc., d/b/a Apollo Services, Inc. ("Apollo"), Jeffrey A. Reddoch, and Chiquita Reddoch.

At the commencement of trial there were twenty-six (26) plaintiffs, however, on March 5, 1999 the parties jointly stipulated that the case would be severed after the completion of all the testimony and evidence of the Plaintiffs thus far, staying all further proceedings in this case and in case number

98cv2103. Therefore, the only claims before the Court were those of plaintiffs George C. Samson, III, Kevin D. Smith, Melvin K. Smith, Norman J. Landry, Brent C. Manuel and Jackie D. Hays ("the Plaintiffs"). At the close of the Plaintiffs' evidence on March 9, 1999, the Defendants moved for Judgment as a Matter of Law pursuant to Rule 52(c) of the Federal Rules of Civil Procedure as to all claims presented by these six (6) plaintiffs.

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants are entitled to a Judgment as a Matter of Law pursuant to Rule 52(c) and all of the Plaintiffs claims are hereby DISMISSED, with prejudice. For the reasons behind the Judgment see the Courts oral reasons given on March 9, 1999 as well as the written additional Reasons for Judgment signed on April 27, 1999.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the [sic] all further proceedings in civil actions numbered 97cv1053 and 98cv2103 are STAYED.

THUS DONE AND SIGNED, this 27th day of April, 1999, in Lafayette, Louisiana.

/s/ _____
Richard T. Haik
United States District
Judge

Judgment entered: 4/28/99

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

[Judgment Entered April 28, 1999]

George C. Samson, III, et al *Plaintiffs*	Civil Action No.: 97-1053
v.	
Apollo Resources, Inc., d/b/a Apollo Services, Inc. et al. *Defendants*	Judge Haik Magistrate Judge Methvin

ADDITIONAL REASONS FOR JUDGMENT

This matter was tried before the Court as a bench trial beginning on March 1, 1999 and ending on March 9, 1999. Present at trial were William L. Melancon on behalf of the Plaintiffs, and Timothy J. McNamara and Steven C. Lanza on behalf of the Defendants, Apollo Resources Inc. d/b/a Apollo Services, Inc. ("Apollo"), Jeffrey A. Reddoch, and Chiquita Reddoch.

Plaintiffs brought suit against Apollo and the Reddochs under the Fair Labor Standards Act (29 U.S.C. § 201 et. seq.) ("FLSA"), the Louisiana Wage Statute (La. R.S. 23:631 and 632) and general employment contract damages. At the commencement of trial there were twenty-six (26) plaintiffs, however, on March 5, 1999 the parties jointly stipulated that the case would be severed after the completion of all the testimony and evidence of the Plaintiffs thus far, staying all further proceedings in this case and in case number 98cv2103. Therefore, the only claims before the Court were those of

plaintiffs George C. Samson, III, Kevin D. Smith, Melvin K. Smith, Norman J. Landry, Brent C. Manuel and Jackie D. Hays ("the Plaintiffs").

On March 9, 1999, at the close of the Plaintiffs' evidence, the Defendants moved for Judgment as a Matter of Law pursuant to Rule 52(c) of the Federal Rules of Civil Procedure as to all claims presented by these six (6) plaintiffs. This Court granted the Rule 52(c) motion in favor of all Defendants and orally issued findings of fact and conclusions of law in open court, reserving the right to issue additional reasons if the Court felt it was necessary. This Court ruled that the Defendants in no way violated the Fair Labor Standards Act, the Louisiana Wage Statute or any general contract law. Due to the complexity of the issues presented in this case the Court has decided to issue additional reasons as to the conclusions of law only. These additional reasons are merely a detailed analysis of the basis of the Courts oral conclusions of law.

I. FACTS

All of the Plaintiffs involved in this suit were at one time employed by Apollo and being paid under a fluctuation workweek or "sliding-scale" method. Apollo paid its employees a monthly wage plus a weekly overtime premium for each hour worked over forty (40). Apollo's overtime premium is calculated by multiplying the monthly wage amount by 4.3 to get the weekly wage. The weekly wage is then divided by the actual number of hours worked by that employee that particular week to come up with the regular rate at which the employee is employed. One-half (½) of the regular rate is equal to the overtime premium rate. The overtime premium rate is then multiplied by the hours worked over forty in that

workweek to determine the total overtime premium due. In other words, Apollo paid its employees a fixed salary for all hours worked in any workweek plus one-half times (instead of one and one-half times) the regular rate of pay for all hours worked over forty.

Apollo did not create this method of payment out of thin air. In 1991, defendant Jeff Reddoch, President of Apollo, contacted the Wage and Hour Division of the Department of Labor ("DOL") to obtain assistance in implementing a pay plan which would both fit the needs of Apollo and comply with the FLSA. Don Stroble, the Assistant District Director of the Wage and Hour Division of the DOL in 1991, testified that he sent the Defendants materials explaining the Fluctuating Workweek or "Sliding-Scale" Method ("FWWM"), and provided assistance to Mr. Reddoch in implementing the FWWM.

One policy that Mr. Stroble helped the Defendants implement was Apollo's policy of taking deductions for occasional willful absences or tardies. Apollo deducted from an employees pay in workweeks where the employee was willfully not available for work, however, these deductions were only taken where the employee had not yet worked forty hours for that workweek. According to the testimony of Mr. Reddoch, deductions were only taken for occasional willful absences or tardies. Apollo did not take any deductions where they believed the employee was absent due to illness or other uncontrollable incidents. Mr. Reddoch and Johnnie Daughdrill, Apollo's operations manager, testified that Apollo required Dr. [sic] excuses from an employee when he was suspected of "playing hookey" from work. Mr. Daughdrill testified that if an employee called in sick to the answering service without talking to or asking to talk to a supervisor a red flag would be raised. Mr. Daughdrill stated that he would then make one or two attempts to contact the employee personally over the telephone,

if that failed then upon that employee's return to work he would ask the employee to get a Dr. [sic] excuse. If no Dr. [sic] excuse was ever provided Apollo would then deduct for the number of hours absent or tardied.

The Plaintiffs have made the following contentions in the case at hand: (1) that the Fluctuation Workweek Method ("FWWM") violates a fundamental tenet of the FLSA in that it does not discourage an employer from working employees past forty hours per week; (2) that Apollo could not use the FWWM because the Plaintiffs did not work "irregular hours" as defined by the Fifth Circuit in *Foremost Dairies, Inc. v. Wirtz*, 381 F.2d 653, 658 (5th Cir. 1967), cert. denied, 390 U.S. 946, 88 S.Ct. 1031, 19 L.Ed.2d 1134 (1968); (3) that the FWWM could not be used if the hours worked in a week exceed sixty; (4) that Apollo did not satisfy the "clear and mutual understanding" requirement of 29 CFR § 778.114 which governs the FWWM; (5) that Apollo made deductions from several employees pay in derogation of the rules governing the FWWM and La. R.S. 23:632; and (6) that the Plaintiffs' are also entitled to recover penalty damages for unpaid wages for each day that Apollo withholds payment in an amount not to exceed ninety days wages, under La. R.S. 23:632.

II. ANALYSIS

A. Purpose of the FLSA

The Plaintiffs' first contention is that the FWWM itself is a violation of the purpose of the FLSA. Specifically, that the FWWM does not discourage an employer from working employees past forty hours per week. Essentially the issue presented by the Plaintiffs is whether or not the FWWM as defined in 29 CFR § 778.114 violates the FLSA. This Court holds that the FWWM as defined in 29 CFR §778.114 does not

violate the FLSA. To appreciate the Courts opinion one must examine the purpose of the FLSA as well as the origin of the FWWM as defined in §778.114.

In 1938, Congress passed the FLSA. 29 U.S.C. §§201 et seq. The FI SA provides that no employer shall employ any employee: (1) at a rate less than minimum wage, nor (2) at a rate less than one and one-half times the "regular rate at which the employee is employed" for hours worked over forty in a particular week. 29 U.S.C. §§206 and 207. Since the enactment of the FLSA the Supreme Court on several occasions has addressed the validity of different pay plans that were in existence prior to the FLSA. In 1942, two such pay plans were approved by the Supreme Court in *Overnight Motor Transp., Co., Inc. v. Missel*, 316 U.S. 527, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942) and *Walling v. A.H. Belo Corp.*, 316 U.S. 624, 62 S.Ct. 1223, 86 L.Ed. 1716 (1942). In *Overnight Motor*, the Court approved what is now 29 CFR §778.114 and is recognized as the FWWM or the "sliding-scale" method. In *Belo*, the Court approved what is now memorialized in 29 U.S.C. §207(f) and commonly referred to as the "Belo" plan ("Belo").

In *Overnight Motor*, the employees in question worked an average of sixty-five hours a week, and the hours worked fluctuated from week to week. Regardless of the actual hours worked the employees were paid a set weekly salary. The Court recognized that Congress did not specifically address other methods of paying wages except by an hourly rate. In fact, the Act does not even mention the notion of "fluctuating hours." On the other hand, the Court stated"we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the act. [W]here the employment contract is for a weekly wage with variable or fluctuating hours the same method of computation produces the regular rate for each week." *Id.* at U.S. 479, S.Ct.

1221; see also *U.S. v. Rosenwasser*, 323 U.S. 360, 65 S.Ct. 295, 89 L.Ed. 3d (1944).

While the "regular rate" is the heart of the overtime provision of the FLSA, 29 U.S.C. §207(a), the Act does not explain exactly how it is computed. The *Overnight Motor* Court specifically addressed the computation of the "regular rate" as it pertains to a weekly wage. The "regular rate" was determined on a weekly basis, because as the Supreme Court stated that it is "abundantly clear" from the wording of the Act itself that the unit of time in which an employer is to distinguish regular from overtime pay is the "week". *Id.* at 579. In *Overnight Motor*, the Court held that when computing overtime compensation for employees under contract for a fixed weekly wage with variable or fluctuating hours the weekly wage is divided by the actual hours worked to determine the regular rate, and time and one-half the regular rate for all hours employed beyond forty, equals overtime compensation. *Id.* at 580; see also *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29 (1944).

Under *Overnight Motor*, when an employee is paid a weekly wage the employee receives a "regular rate" for all hours worked in that workweek, whether few or many, including hours worked over forty. Therefore, to comply with the time and one-half overtime provision of the FLSA an employer need only pay the employee an additional overtime premium equivalent to one-half of the "regular rate" multiplied by all of the hours worked over forty, because the employee already received one times the "regular rate" for each hour over forty. This computation has been memorialized by the DOL in 29 CFR §778.114 and the Wage and Hour Division's, Field Operations handbook. Regulation 778.114 reads in pertinent part:

778.114 Fixed salary for fluctuating hours

(a) . . . such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement. (b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for

> overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

Regulation 778.114 has been accepted by a majority of the Circuits, including the Fifth Circuit, and is upheld by this Court today. *Overnight Motor*, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); *Blackmon v. Brookshire Grocery Co.*, 835 F.2d 1135 (5th Cir. 1988); *Martin v. Tango's Restaurant, Inc*, 969 F.2d 1319 (1st Cir. 1992); *Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784, (1st Cir. 1985) (No. 85-1090); *Anderson v. County of Kershaw*, 1999 WL 55182 (4th Cir. 2/08/99); *Griffin v. Wake County*, 142 F.3d 712 (4th Cir., 4/27/98); *Fakouri v. Pizza Hut of America, Inc.*, 824 F.2d 470 (6th Cir. 1987); *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1993); *Marshall v. Hamburg Shirt Corp.*, 577 F.2d 444 (8th Cir. 1978); *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d (9th Cir. 1982); *Wethington v. City of Montgomery*, 935 F.2d (11th Cir. 1991).

As for the purpose of the FLSA, Congress' findings and policy concerning the creation of the FLSA are contained in Section 202 of the FLSA, which read as follows:

> Congressional finding and declaration of policy
>
> (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers (1) causes commerce and the instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes and unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

29 U.S.C. § 202 (a). As stated by the Supreme Court in *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945), the purpose of the FLSA was to "protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce." See also, *Foremost Dairies, Inc. v. W. Willard Wirtz*, 381 F.2d 653 (5th Cir. 1967), cert. denied, 390 U.S. 946, 88 S.Ct. 1031, 19 L.Ed. 2d 1134 (1968).

In formulating the FLSA Congress may also have intended to discourage an employer from working employees past forty hours per week may. Even so, when enforcing the FLSA courts look not only at Congress' purpose, but more importantly the method Congress chose to achieve that purpose. The method Congress chose to achieve its purpose behind the FLSA is the overtime provision of section 207 (a), This provision may not be perfect, but as the Court stated in *Overnight Motor*, "[overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations." *Id.* at 572.

Since the FWWM complies with the requirements of 207(a) it is therefore in compliance with the policy and purpose of the FLSA. Also, this Court finds that the FWWM provides as much discouragement as the time and one-half method. Under the FWWM employers are still required to pay time and one-half of the "regular rate." In fact, employers using the FWWM must pay a higher salary in weeks where less hours are worked to remain competitive as well as comply with the FLSA.

This Court holds that the Plaintiffs' contention that the FWWM as defined in 29 CFR §778.114 violates a fundamental tenet of the FLSA in that it does not discourage an employer from working employees past 40 hours per week is contrary to any existing jurisprudence and regulations and is completely unsupported. The FWWM as defined in 29 CFR 778.114 was created by the Supreme Court's ruling in *Overnight Motor* and has been applied by almost every Circuit in the United States. The Court's holding in *Overnight Motor* has been a rule of decision for almost fifty-one years, and recognized as such on each appropriate occasion. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Congress has permitted 207 (a) to

stand unmodified and the courts have applied it as so construed, and so shall this Court.

B. Irregular Hours

The Plaintiffs' second contention is that Apollo can not use the FWWM because its employees do not work "irregular hours" as defined by the Fifth Circuit in *Foremost Dairies*, 381 F.2d 653. In *Foremost Dairies*, the Court stated that hours were not "irregular" as required by 29 U.S.C. §207(f), commonly referred to as the "Belo" plan, unless the employee's hours fluctuate above and below forty hours per week. *Id.* The Plaintiffs argue that since the first sentence of the *Overnight Motor* opinion states that the case involved "an employee working irregular hours for a fixed weekly wage" the "irregular" hour standard of *Foremost Dairies* must be applied to the FWWM.

The Plaintiffs' argument is flawed for several reasons. The most obvious reason being the contrary Fifth Circuit jurisprudence. *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976). In *Yadav*, the Court held that, "[t]he appellants' reliance upon the language of section 7(f) of the FLSA, 29 U.S.C.A. § 207(F) (1970), and our opinion in *Foremost Dairies, Inc. v. Wirtz*, . . . is misplaced. The application of the 'fluctuating work week' formula is not at all dependant upon a finding that the employer is entitled to the exception commonly referred to as the 'Belo' provision." *Id.* at 1207; See also *Condo v. Sysco Corp.*, 1 F.3d 599 (7th Cir. 1999); *Haynes v. True Green Corp.*, 154 Ill. App. 3d 967, 107 Ill. Dec. 792, 507 N.E. 2d 945 (1987). In implementing the FWWM, an employer has never been bound by the requirements of the "Belo" plan.

The Supreme Court itself in *Overnight Motor* and *Belo*, which were decided on the same day, specifically states that the

two pay plans at issue are "entirely unlike" one another. *Belo*, *Id.* at 634; see also *Overnight Motor*, *Id.* at 581. The "Belo" plan was enacted by Congress in a response to the Supreme Courts decisions of *Belo*, *Id.* and *Walling v. Haliburton Oil Well Cementing Co.*, 331 U.S. 17, 67 S.Ct. 1056 (1947). Under the "Belo" plan, an employer first determines an employee's hourly rate and the maximum number of hours in a week that the employee will be guaranteed, always in excess of forty and never more than sixty. The guaranteed pay for each week is determined by multiplying the hourly rate times forty, then multiplying time and one-half the hourly rate by the number of hours guaranteed over forty, and adding the two together. Thus, the "Belo" method is salary which includes hourly pay for the first forty hours and a pay for predicted overtime hours at a rate of one and one-half times the regular rate of pay. The employee is paid the guaranteed salary no matter how many hours worked in a particular week. The guaranteed salary cannot cover more than sixty hours, and the employee must be paid an additional one and one-half times the regular rate of pay for all hours worked over the guaranteed hours. See 29 U.S.C. § 207(f); *Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206; *Condo v. Sysco Corp.*, 1 F.3d 599. This method of pay is different from the FWWM where the employee is paid a salary for all hours worked in a week plus an overtime premium of one-half the "regular rate" for all hours over forty. The Plaintiffs' have failed to cite and this Court is unaware of any case which applies the "irregular" hour requirement of the "Belo" plan to the FWWM.

In addition, while the Court in *Overnight Motor* does not mention "irregular" in the first sentence, that is one of only two times the phrase is mentioned in the case. Even 29 CFR §778.114 which outlines the requirements of the FWWM uses the terms fluctuating and variable to describe hours instead of

"irregular." Also, in 1981, the Administrator of the Wage and Hour Division of the DOL added subsection (b) to §778.114 which provides an illustration on how to calculate the regular rate under the FWWM. 46 FR 7310, Jan. 23, 1981. The illustration computes the regular rate of an employee who in the course of four weeks worked 40, 44, 50 and 48 hours. None of the weeks in the illustration are "irregular." That is evidence that the DOL does not believe the hours must be "irregular" to use the FWWM.

This Court finds that the "Belo" plan and the FWWM are wholly different and unrelated methods of payment, and, therefore, the Plaintiffs' contention that "irregular" hours is a requirement of the FWWM is unfounded and hereby rejected. We will not apply the "irregular" hours requirement of the "Belo" plan to the FWWM. Since the Supreme Court approval of the FWWM in *Overnight Motor* neither the courts nor the DOL have deemed it necessary to apply the "irregular" hours requirement to the FWWM and neither does this Court.

C. Sixty Hour Limitation

The Plaintiffs' third contention is that the FWWM can not be used if the hours worked in a week exceed sixty. The Plaintiff's [sic] assert that 29 CFR §778.114(c) explicitly prohibits an employer from using the FWWM to calculate overtime if the employee works so many hours that his pay rate for overtime hours is no greater than the pay rate he would have received if he worked no overtime hours. The Plaintiffs' then contend that this threshold is crossed at sixty hours. In actuality, Plaintiffs' argument is that the Court must compare the regular rate of pay at forty hours per week with the overtime rate of pay at sixty hours per week, and if the overtime rate at sixty hours per week is less that the regular rate of pay at forty hours per week then the FWWM cannot be used. For example,

if an employee is paid a weekly salary of $600.00, his regular rate of pay for a forty hour workweek is $15.00 per hour (600 divided by 40=15). If the same employee works sixty hours in a particular week his regular rate of pay is $10.00 per hour (600 divided by 60=10) and his overtime rate is $15.00 per hour (10 times one and one-half). In any week that the employee works over sixty hours a week his overtime rate of pay will be less than $15.00 per hour.

The Plaintiffs' argument is centered around the final sentence of 29 CFR §778.114(c). This sentence provides:

> [W]here all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

It is apparent that the Plaintiffs' argument is based on a misinterpretation of the regulations. As stated before, it is "abundantly clear" from the wording of the FLSA that the unit of time in which an employer is to distinguish regular from overtime is the "week." *Overnight Motor*, 316 U.S. at 579, 62 S.Ct. at 1221; 29 U.S.C. §201 et. seq. Even 29 CFR §778.114 expressly states that the regular rate of pay (or nonovertime hours rate) varies from week to week because it is determined by dividing all hours worked in a workweek into the salary for that workweek. Therefore, in order to prevail the Plaintiffs' must prove that they were paid the same rate for nonovertime and overtime hours in the same workweek. The Plaintiffs' cannot compare the nonovertime rate for a forty hour workweek with an overtime rate in a sixty hour or more workweek, because they are two different workweeks.

The Plaintiffs' argument misses the purpose of the last sentence of 29 CFR §778.114. In *Cash v. Conn Appliances, Inc.*, 2 F.Supp 2d 884 (E.D. Tx. 1997), the court explained that this sentence was included to prevent the practice of "cutting salary for a week or weeks in which less than forty hours is worked to counterbalance compensation for hours over forty worked in another week of the same pay period." *Id.* at 895 n.24. For example, assume an employee works fifty hours in one workweek and thirty hours in the next. Instead of paying the employee an overtime premium for the ten overtime hours worked in the first fifty hour workweek, the employer applies the ten overtime hours to the second workweek of thirty hours and pays the employee for forty straight time hours per workweek. As a result, in the second workweek the employee would receive a regular rate for the thirty nonovertime hours as well as the ten overtime hours worked in the first week. Under that practice, the employee would receive no greater pay for his overtime hours than his nonovertime hours. The last sentence of 29 CFR §778.114 was intended to prohibit that type of payment scheme not to create a sixty hour limitation to the FWWM.

Also, the Plaintiffs' seem to imply that some type of limitation is required, because the longer an employee works the less his regular rate of pay will be per hour. Congress has provided limitations; 1) an employee may not be paid at a rate less than the minimum wage and 2) and employee must be paid one and one-half times the "regular rate" for each hour worked over forty. 29 U.S.C. §§ 206, 207. However, the fact that an employee makes less the longer he or she works is irrelevant. The Supreme court in *Overnight Motor*, stated, "[i]t is true that the longer the hours the less the rate an the pay per hour. This is not an argument, however, against this [FWWM] method of determining the regular rate of employment for the week in

question. Apart from the Act if there is a fixed weekly wage regardless of the length of the workweek, the longer the hours the less are the earnings per hour." *Id.* at 580. In addition, in *Overnight Motor*, the plaintiffs worked an average of sixty-five hours a workweek. *Id.* at 572. Therefore, the Court in *Overnight Motor* was faced with the exact scenario the Plaintiffs claim should be prohibited and the Court did not find that this sixty hour limitation was required.

This Court will not create a sixty hour limitation to the FWWM. The sixty hour limitation in the "Belo" plan, 29 U.S.C. § 207(f), has been in place since 1949 and neither the courts nor the DOL have expressed any intention to apply a sixty hour limitation to the FWWM, as the Plaintiffs' are proposing. Therefore, the Plaintiffs' third contention is also rejected.

D. Clear and Mutual Understanding Requirement

The Plaintiffs' fourth contention is that Apollo did not satisfy the "clear and mutual understanding" requirement of 29 CFR § 778.114. The Plaintiffs' seem to contend that the employee must understand the intricacies of the FWWM as well as have a close approximation of the actual number of hours he will be required to work. At the conclusion of the trial this Court held that Apollo satisfied the "clear and mutual" understanding requirement as to all the Plaintiffs. Because the findings of fact concerning the Plaintiffs' actual understanding of Apollo's pay method and potential hours were orally given by the court they will not be repeated at this time. The following is an analysis of the standard which was used by the Court in concluding that Apollo satisfied the "clear and mutual understanding" requirement.

To use the fluctuating workweek method there must be an understanding between the employer and the employee.

Section 778.114(a) provides:

> Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period,. . . , and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay.

Reading the regulation literally it requires a clear and mutual understanding between the employer and employee that a salary will be paid as compensation for all hours worked each week and an overtime premium not less than one-half the regular rate will be paid for all hours worked over forty. In *Cash v. Conn Appliances, Inc.*, 2 F.Supp. 2d 884 (E.D. Tex., 1997), the court held that an "employee need only possess a clear understanding 'that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number.'" Citing §778.114(a). The Fifth Circuit has not yet specifically addressed the understanding requirement of the FWWM, however, the Fourth Circuit has on several accessions.

In *Bailey v. County of Georgetown*, 94 F.3d 152 (4th Cir. 1996), the Fourth Circuit stated that neither the regulation nor the FLSA requires that an employee also understand the manner in which their overtime pay is calculated. *Id.* at 156; see also *Griffin v. Wake County*, 142 F.3d 712 (4th Cir. 1998); *Roy v. County of Lexington, S.C.*, 141 F.3d 533 (4th Cir. 1998). Rather, "if it is clear from the employee's actions that he or she understood the payment plan in spite of after-the-fact verbal contentions otherwise," the County has sufficiently

demonstrated a "clear mutual understanding." *Roy v. County of Lexington*, 141 F.3d at 547; quoting *Mayhew v. Wells*, 125 F.3d 216, 219 (4th Cir. 1997). It is enough if the employer "provide[d] its employees with a reasonably clear and accurate explanation of their compensation." *Griffin v. Wake County*, 142 F.3d at 717; quoting *Roy v. County of Lexington*, 928 F.Supp. 1406, 1419, vacated in part on other grounds, 948 F.Supp. 529 (D.S.C. 1996), aff'd, 141 F.3d 533 (4th Cir. 1998).

The Plaintiffs' cite three cases in their pre-trial memorandum where courts have found no clear and mutual understanding between the employees and the employer. (Plaintiffs' Pre-trial Memorandum p.11, ¶ 1) *Oliver v. Mercy Medical Center, Inc.*, 695 F.2d 379 (9th Cir. 1982); *Yourman v. Dinkins*, 865 F.Supp. 154 (S.D.N.Y. 1994); *Dingwall v. Friedman Fisher Associates*, 3 F.Supp. 2d 215 (N.D.N.Y. 1998). The facts at issue in this case are distinguishable from the facts in *Oliver*. In *Oliver*, the employee was not paid any overtime premium. Aside from being factually distinguishable, the court in *Oliver* did not spell out what was required to meet the understanding requirement. In *Dingwall*, the court citing *Roy v. County of Lexington*, adopted the Fourth Circuit standard for the understanding requirement. *Id.* In *Yourman*, the court does not once mention the understanding requirement. *Id.* Hence, this Court finds the Plaintiffs' supporting cases to be irrelevant and not controlling.

This Court acknowledges that the FLSA was enacted to protect those employee who lack the bargaining power, i.e. blue-collar workers. However, the FLSA does not dictate that employers subjectively determine whether each and every employee is capable of and actually does understand the intricacies of their method of pay. Therefore, this Court adopts the Fourth Circuits standard for the understanding requirement, and holds that employers must provide their employees with a

reasonably clear and accurate explanation that their compensation will include a fixed salary, which will cover all hours worked in any workweek, as well as an additional overtime premium, which will not be less than one-half their regular rate for that particular workweek.

E. Improper Deductions

The Plaintiffs' fifth contention is that Apollo made deductions from several employees pay in derogation of the rules governing the FWWM. This Court rejects this argument also. The Plaintiff's contend that an employer cannot make deductions for any reason when the employee does any work during the workweek. Citing, Wage & Hour Opinion Letter No. 479, May 18, 1966; *Yourman v. Dinkins*, 865 F.Supp. 154 (S.D.N.Y. 1994); *Aiken v. County of Hampton, South Carolina*, 977 F.Supp. 390, 395 (D.S.C. 1997); *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Local 539 Gary Firefighters v. City of Gary, Indiana*, 1995 WL 934175, p. *9 (N.D. Ind.), citing *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 286 (7th Cir. 1994).

While the Plaintiffs' correctly cite the 1966 DOL opinion letter they completely ignore the two subsequent opinion letters and the Wage and Hour Division's Field Operations Handbook which overrule the 1966 letter. In its subsequent opinion letters and Field Operations handbook the DOL has clearly stated that employees using the FWWM May take occasional deductions for disciplinary reasons related to voluntary of willful absences of tardiness. Wage and Hour Division's Field Operations Handbook, ¶32b04b; DOL, Wage and Hour Opinion Letter, May 26, 1982; DOL, Wage and Hour Opinion letter No. 988, 1969-73, Wages & Hours (CCH) ¶30,531 (May 1, 1069) [sic]. This court recognizes that interpretations promulgated by the Wage and Hour division of

the DOL are not binding. However, the Administrator's policies and standards are entitled to great weight and respect. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1949). This Court finds that an employer using the FWWM may take deductions from an employees salary where the employee absents himself from work for personal reasons, other than sickness or an accident.

All of the cases cited by the Plaintiffs' discuss the deduction rules regarding employees employed in a bona fide executive capacity. 29 CFR 541.118; see 29 U.S.C. §213(a)(4). The courts in *Local 539 Gary Firefighters and Klein* attempt to apply the deduction rules of 29 CFR § 541.118 to the FWWM. Under 29 U.S.C. §213(a)(4), employees "employed in a bona fide executive, administrative, or professional capacity" are not covered by the FLSA. One of the requirements to obtain the exempt status under §213(a)(1) is that the employee must be paid a specified minimum amount on a "salary basis." *Auer v. Robbins*, 147 S.Ct. at 908; 29 CFR §§ 541.1(f), 541.2(e), 541.3(e). The rules regarding which deductions can be taken from the salary of a [sic] exempt employee does not apply to the deductions that can be taken from the salary of non-exempt employees paid under the FWWM. *Cash v. Conn Appliances, Inc.*, 2 F.Supp. 884 (E.D.Tex 1992).

Even if this Court were to apply 29 CFR §541.118 to the FWWM by analogy the same conclusion would be reached. The regulation requires that to be paid on a "salary basis" an employee's compensation cannot be subject to reduction because of variations in the "quality or quantity of the work performed." However, the regulation goes on the carve out an exception from this rule by stating, "[d]eductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or

accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." 29 CFR §541.118(a)(2). This Court asserts that even under the bona fide executive provision the deductions taken by Apollo were permissible.

The Plaintiffs also claim that Louisiana law prohibits deductions made from the salary of employees paid under the FWWM. Louisiana Revised Statute 23:635 provides that "[n]o person . . . shall assess any fines against his employees or deduct any sum as fines from their wages." "Fines" within the meaning to La. R.S. 23:635 are pecuniary penalties imposed for violation of some rule, or regulation. *Georesearch, Inc. v. Morriss*, 193 F.Supp. 163 (W.D.La. 1961); *Cupp v. Banks*, 25,762 (La. App. 2 Cir. 5/4/94), 637 So.2d 678 (La.App. 2 Cir. 1994); *Brown v. Navarre Chevrolet, Inc.*, 610 So.2d 165 (La.App. 3 Cir. 1992); *Glover v. Diving Services Intern., Inc.*, 577 So.2d 1103 (La.App. 1 Cir. 1991). Clearly the fact that Apollo referred to these deductions as disciplinary does not per se make them "fines" within the meaning of La. R.S. 23:635. Apollo deducted from an employees weekly salary when the employee willfully absenced himself from work. Neither jurisprudence nor logic supports an interpretation of La. R.S. 23:635 which would prohibit employers from deducting from the salaries of employees who do not show up for work. Therefore, this Court finds that the deductions taken by Apollo are not "fines" within the meaning of La.R.S. 23:635, and are not prohibited by Louisiana Law.

F. Preemption of Louisiana Law Claims by the FLSA

The Plaintiffs' final contention is that they are entitled to recover penalty damages and attorney's fees for unpaid wages for each day that Apollo withholds payment in an

amount not to exceed ninety days wages, under La. R.S. 23:632. It is not necessary for this Court to determine whether the FLSA preempts La. R.S. 23:632, because this Court found that no back wages were due. The Court found that no back wages were due for overtime, bonuses nor uncredited hours. Even though the Defendants' asserted that the issue of uncredited hours was moot, because the Plaintiffs' counsel was given checks during the trial for all alleged uncredited hours, this Court still ruled that only one of the Plaintiffs proved that they were entitled to any hours which they allege where not credited. In reference to the one plaintiff, Brent Manuel, the Court found that he may have been entitled to one or two hours. Such an award would be so de minimis that the court will not order penalties or attorney's fees. This Court is of the opinion that the Defendants were never told, prior to trial, exactly how many hours the Plaintiffs' were owed and for what reason they were owed. In fact, throughout the trial even the actual number of uncredited hours alleged changed from day to day. Any award of penalties and attorneys fees in this case would be unjust and an abuse of the Louisiana Wage Statute.

III. CONCLUSION

This Court holds that the Defendants did not violate either the Fair Labor Standards Act, the Louisiana Wage State or any general contract law. While the spirit of the FLSA is to be considered each time a court interprets the Act, we are not at liberty to go outside the guidelines established by Congress to enforce the Act. The overtime provision of section 207(a) may not solve all the problems of the blue-collar worker, but it is what Congress selected to protect them. In accordance with well settled jurisprudence, this Court holds that the FWWM, as it is defined in 29 CFR §778.114, complies with section 207(a)

of the FLSA. Also, this Court found that the pay plan implemented at Apollo complied with the requirements of 29 CFR § 778.114. Therefore, the pay plan employed by the Defendants in no way violates the FLSA, the Louisiana Wage Statute or any general contract law.

THUS DONE AND SIGNED this 27th day of April, 1999 at Lafayette, Louisiana.

/s/ _____

Richard T. Haik
United States District Judge

Judgment Entered: 4/28/99

APPENDIX E

Opinion Letter of Wage-Hour Administrator.
Opinion Letter No. 479
May 18, 1966

Fair Labor Standards Act

This is in further reference to your letter concerning the application of the maximum hours and overtime compensation provisions of the Fair Labor Standards Act to your client's proposed method of compensation.

You state that your client intends to employ certain supervisory personnel to whom he will pay a fixed salary for variable hours of work in a workweek. These employees will generally work alternating workweeks of 43 and 51 hours. However, for one month before Christmas and Easter of each year the employees will work 6 days every week and during about six other workweeks in the year the employees will be expected to work an extra night of from 3 to 4 hours. You further state that for a 43 hour workweek your client would pay the employee his agreed upon salary plus 3 times one-half the hourly rate computed by dividing the weekly salary by 43 and for a workweek of 51 hours the employee would receive his agreed upon salary plus 11 times one-half the hourly rate computed by dividing the salary by 51 hours. Your client believes that such a method of payment meets the requirements of section 778.114 of Interpretative Bulletin, Part 778, and you request an advisory opinion thereon.

While the illustration you give concerning the 43 and 51 hours workweeks seem to meet the requirements of section 778.114, we cannot tell with any certainty how your client's employees would be paid when they work less or more hours than those in a workweek. Generally speaking, the fluctuating workweek method of computing and paying overtime

compensation is utilized in connection with employees who work a varying or irregular number of hours in a workweek. The fundamental characteristic of the method is that the employee receives the full amount of his fixed salary as straight time pay every week, regardless of the number of hours or days worked in the workweek, so long as the employee performs any work during the workweek. Deductions for absences of less than a week, whether for illness, personal business, or other reasons, may not be made under this method of compensation.

Also, a salary will not be considered payment for a workweek of varying hours, for the purpose of the Act, unless all the facts demonstrate that this is so, and it is clearly understood and agreed upon by the employee and employer. There must be a clear agreement that the salary is straight time compensation for whatever hours are worked in the workweek, with no possibility that it is earned in the first 40 hours of work or other fixed period. When a salary is paid for a fluctuating workweek it must not only in fact assure that no workweek will be worked in which the salary fails to provide at least the current statutory minimum hourly rate of $1.25, but the salary must also be so arranged that it is reasonably calculated to provide for such a statutory minimum.

Since the employees your client is concerned with are to be supervisory employees the possibility exists that the exemption provided in section 13(a)(1) of the Act, as defined in Regulations, Part 541, may be applicable to their employment. If that is the case, neither the minimum wage nor the maximum hours and overtime compensation provisions of the Act would be applicable.

APPENDIX F

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

May 26, 1982
(received June 6, 1982)

This is in reply to your letter in which you request an opinion regarding a fixed salary for fluctuating hours method of computing overtime compensation.

As discussed in 29 CFR Section 778.114, the "fluctuating workweek" method may not be utilized unless the salary is sufficient to provide for compensation at a rate not less than the applicable minimum wage for every hour worked in those workweeks in which the number of hours is the greatest. It has been our position that use of this plan is invalid where an employer can reasonably anticipate that employees will be required to work so many hours that the guaranteed salary would be insufficient to provide the minimum wage for each hour worked. (See enclosed WH Opinion Letter dated February 6, 1969.) However, in the case of an emergency or unforeseen situation which occasions such excess hours in any workweek, we would permit the employer to pay the applicable minimum wage for the first forty hours and one and one-half times such minimum wage for all hours worked over 40 without invalidating the "fluctuating workweek" plan.

Since the fundamental characteristic of the fluctuating workweek method of compensation is that the employee receives the fixed salary as straight time compensation for the week, regardless of the number of hours or days worked, if this

method of payment is adopted, an employer is obligated to pay the salary in full as long as the employee performs any work during the workweek.

There are two exceptions to this rule: disciplinary deductions and initial and terminal weeks of employment. Occasional deductions may be made as a disciplinary measure for willful absence or tardiness, but they may not cut into the minimum wage or overtime pay required by the Act. Similarly, an employee employed on a fixed salary basis for irregular hours of work may be paid a pro rata share of his/her salary in the initial or terminal week of employment, when he/she is not in payroll status for the entire week.

Generally, an employer who utilizes this plan may not make deductions for absences of less than a week due to illness, unless there is an employer-furnished sick pay plan which provides independent compensation for such absences. Under such a plan (whether in the form of a wage-continuation insurance policy or a sick-leave policy) the employee must receive total compensation equaling at least his/her regular salary for the workweek.

With respect to your method of computing overtime premiums on monthly commissions or bonuses, our calculations indicate that although the mathematical steps you take differ from those outlined in 29 CFR Section 778.120, the resulting amount of premium pay is practically the same. Therefore, your method of averaging workweeks and multiplying the coefficient (for the average workweek) by the commission or bonus amount is acceptable as long as the employer clearly understands that no workweeks of less than 40 hours may be used in calculating the average workweek.

We also wish to point out that, contrary to the information contained in the next to the last paragraph on page 3 of your enclosure, it is the employer and not the employee who is responsible for maintaining an accurate record of hours worked and all other records required by 29 CFR Section 516.

We trust this is responsive to your inquiry.

Sincerely,

/s/_____
William M. Otter
Administrator

Enclosure

APPENDIX G

1997 WL 998050

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
December 24, 1997

***

This is in response to your letter to Secretary Herman regarding overtime compensation under the Fair Labor Standards Act (FLSA). You ask four specific questions, which will be answered in the order asked.

Question 1: If an employee paid a fixed salary for fluctuating hours (fluctuating workweek method) needs sick/personal or vacation time, can they be required to use vacation/sick for days missed and also can they be docked under this program for partial or full days once they use all available benefits?

Answer 1: Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114 of C.F.R. Part 778 (copy enclosed), one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted. However, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying

overtime need not be paid his/her full salary in any workweek when he/she performs no work.

Question 2: If a showroom sales staff is hourly + commission, and they earn a monthly commission must you take that commission and compute the amount allocable to each week of that month and pay additional overtime, even if you've already paid overtime based on their hourly wage?

Answer 2: Commissions (whether based on a percentage of total sales or of sales in excess of a specified amount, or on some other formula) are payments for hours worked and must be included in the regular rate. Where it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to be earned each week, some other method must be adapted. Two methods commonly used are allocating equal amounts of the commission to each workweek during the commission period or allocating equal amounts of the commission to each hour worked during the commission period. These methods of allocating commissions are discussed in section 778.120.

Question 3: If we establish a salary for a regular 45 hour workweek and pay overtime according to a salary for a workweek exceeding 40 hours, can you dock for partial days or full days for sick/personal and or vacation?

Answer 3: If an employee is paid a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for practical purposes employed at an hourly rate of pay.

For example:

If an employee is paid a fixed salary of $300 for a fixed workweek of 45 hours, the employee's regular rate of pay is $6.67 ($300/45 hours). During a workweek when the employee works 45 hours, he/she will receive $300 salary plus $16.68 in overtime compensation (1/2 x $6.67 x 5 hours) or a total of $316.68.

During a workweek when the employee works 48 hours, he/she will receive $300 salary plus $16.68 in overtime compensation for the hours between 40 and 45 plus $30.02 for the hours worked between 45 and 48 ($6.67 x 1 1/2 x 3 hours) or a total of $346.70. In a workweek where the employee works only 38 hours, he/she will receive $253.45 (38 hours x $6.67).

Question 4: Can you pay a showroom sales associate on a salary basis and consider him or her exempt from overtime if the associate does not handle outside sales 80% or more of the time?

Answer 4: The criteria for the executive, administrative, professional and outside sales exemption are contained in 29 C.F.R. Part 541 (copy enclosed). There is not enough information in your letter for a determination on the exempt status of a showroom sales associate to be made.

If you have further questions regarding the application of the Fair Labor Standards Act you may find it more convenient to contact the Richmond, Virginia Wage and Hour District Office located at The 700 Center, 700 East Franklin Street, Suite 560, Richmond, Virginia, 23219, telephone: 804-771-2995.

We trust this is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosures

1997 WL 998050 (DOL WAGE-HOUR)

APPENDIX H

1996 WL 1031769

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
March 28, 1996

***

This is in response to your letter requesting an opinion concerning the application of section 778.114 of 29 CFR Part 778 to deductions for vacation and sick leave. In this regard, we note that you have enclosed copies of opinions relative to section 778.114 and section 541.118 of 29 CFR Part 541.

You state that your client pays its employees overtime under the fluctuating workweek method as outlined in section 778.114, and you request our opinion regarding three questions concerning these employees. Based on the information provided, our responses to your questions are as follows:

Q.1. Can a partial or full day's absence be charged against an allowable vacation "bank", as long as the employee does not exhaust his allowed vacation days, and thus does not have his pay reduced?

A.1. Yes, partial or full days absences may be charged against an employee's allowable vacation "bank" as long as the employee receives his or her full salary in any workweek when he or she performs any work.

Q.2. Can a partial or full day's absence be charged against an allowable absence "bank", as long as the employee does not exhaust his allowed absences, and thus does not have his pay reduced?

A.2. Same as A.1. above for an allowable absence "bank."

Q.3. If an employee exhausts his allowed absences, can his pay be reduced for subsequent full day absences?

A.3. No. One of the primary requirements of section 778.114 is that the employee receives his or her guaranteed salary in any workweek when he or she performs any work. Under section 778.114, the fact that an employee has exhausted his or her allowed absences would not permit an employer to make deductions from the employee's salary for full day absences.

Furthermore, while the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his or her full salary in any workweek when he or she performs no work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

1996 WL 1031769 (DOL WAGE-HOUR)

APPENDIX I

1995 WL 1032466

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
February 27, 1995

***

This is in response to your letter requesting an opinion concerning the application of section 778.114 of CFR Part 778 to deductions for vacation and sick leave when employees have worked some in the weeks that they take this time off.

You state that an employer gives each of his employees one day vacation and one day sick pay for each four-week period that the employee works. An employee who is paid on the fluctuating workweek salary basis takes two days off during a workweek for personal reasons. The employer pays the employee his full salary for that workweek, and deducts two days vacation pay from his accrued vacation time. Such deductions occurred several times when the employee took off for personal reasons until he had exhausted all of his vacation time. We note that the employee was paid his full salary during these workweeks.

You further state that the employer closed down all operations for one week for its annual vacation, but did not pay the employee who is paid on a fluctuating workweek basis any vacation pay because he had previously used up his vacation time. The employee does not believe that the fluctuating workweek salary basis was met because of the deductions made.

Generally, an employee paid under the fluctuating workweek method must receive his/her full salary in any workweek in which he/she performs work. As explained in section 778.114, one of the primary requirements is that the employee receives his/her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they be few or many. Therefore, in your situation the requirements of section 778.114 are met where the employee is paid his/her full salary in any workweek when he/she performs any work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion. While the principles set forth in section 541.118 of 29 CFR Part 541 are not applicable with regard to the principles set forth in section 778.114, it is our opinion that an employee who is compensated under the fluctuating workweek method of paying overtime need not be paid his/her full salary in any workweek when he/she performs no work. The fact that deductions are made from vacation or sick leave banks because of absences for personal reasons or illness would not change this opinion, as long as no deductions are made from an employee's salary, if his or her leave bank has been exhausted.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect

to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

APPENDIX J

1999 WL 1002390

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
April 20, 1999

***

This is in response to your request for an opinion with respect to the following three questions:

Your first question is derived from an opinion letter dated March 28, 1996. You ask why deductions are allowed for exempt salaried employees under §541.118 for an absence of a full day for personal reasons or disability, and are not allowed for salaried non-exempt employees on a fluctuating workweek under § 778.114?

As stated in the March 28, 1996 letter, the principles set forth in s541.118 are not applicable with regard to the principles set forth in §778.114. Section 541.118 refers to the salary requirements for employees who may qualify for exemption from the minimum wage and overtime pay requirements under section 13(a)(1) of the Fair Labor Standards Act (FLSA), and not to the salary requirements under the fluctuating workweek method of compensation. As explained in §778.114, one of the primary requirements is that the employee receives his or her guaranteed salary regardless of the number of hours or days worked in the workweek, whether they are few or many. Therefore, no deductions in the employee's salary for full day absences are allowed. On the other hand, §541.118 allows deductions to be made in the guaranteed salary

of exempt employees for full day absences under certain circumstances. §§541.118(a)(2) and 541.118(a)(3).

In your second question you state that an employer closes the plant on designated holidays and gives full pay for the day to all eligible employees. An employee is eligible to receive full pay only if he or she has been employed for 3 months and works on the workday preceding the holiday. In this situation, exempt employee A has worked for only 2 months before the holiday, and exempt employee B did not work on the day preceding the holiday. You ask "If either of them is denied pay for the unworked holiday, will the salaried status be impaired?" The answer is yes. As stated in §541.118, an employee will be considered to be paid "on a salary basis" if under his or her employment agreement he or she regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of the quality or quantity of work performed. Thus, an employee will not be considered to be paid "on a salary basis" if deductions are made from his or her predetermined compensation for unworked holidays. Such deductions are not permitted under the regulations. See §541.118(a)(6).

Your third question relates to an opinion letter dated February 25, 1997, concerning an exempt employee who occasionally works at a second, non-exempt position. It was stated that if the employee devoted more than 20% of his time in a workweek to the extra, non-exempt work, he would lose his exempt status. You ask "Where the employee's salary is $250 per week or more, should not the limit on the amount of non-exempt work be expressed in terms of "primary duty" instead of 20%? The answer is yes. Under the "short" test, an executive employee who is paid at least $250 a week may qualify for exemption if his or her primary duty consists of

management and who regularly directs the work of at least two or more other employees (§541.1(f)). An administrative employee who is paid on a salary basis of at least $250 a week may qualify for exemption if the employee has as his or her primary duty office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which include work requiring the exercise of discretion and independent judgment (§541.2(e)(2)); and a professional employee who is paid at least $250 a week may qualify for exemption if the employee's primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study and the consistent exercise of discretion and judgment (§541.3(e)).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that this information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosure

1999 WL 1002390 (DOL WAGE-HOUR)

APPENDIX K

29 C.F.R. § 778.114 – Fixed Salary For Fluctuating Hours

(a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked into the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from

week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

(c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employees average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are n amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the

prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7310, Jan. 23, 1981]

Supreme Court, U.S.
FILED
AUG 20 2001

No. 00-1891

IN THE

Supreme Court of the United States

GEORGE C. SAMSON, *et al.*,

Petitioners,

v.

APOLLO RESOURCES, INC.,
doing business as APOLLO SERVICES,
JEFFREY A. REDDOCH and CHIQUITA REDDOCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Apollo Resources, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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SUMMARY OF OPPOSITION

The claims of Petitioners are supported by three faulty premises – one which relates to the law, the other which relates to the facts and the final one which relates to Petitioners' assertion that this Court should grant a writ of certiorari under the facts of this case.

Petitioners' legal premise in support of their claims is that the established body of law finding the fluctuating workweek pay plan under 29 C.F.R. 778.114 ("FWW") is compliant with the Fair Labor Standards Act ("FLSA"), going back almost 60 years to this Honorable Court's decision in the case of *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216 (1942), should be overruled. Such a suggestion is completely without merit and without any support from applicable legal authority.

The second premise asserted by the Petitioners relates to the facts of what actually occurred during their employment with Apollo Resources, Inc. ("Apollo") and what was established at trial. Judge Richard T. Haik, the trier of fact, reviewed extensive documentary evidence and heard extensive testimony from all six plaintiffs, as well as from four members of Apollo's management (called under cross-examination), observed their demeanor and even personally questioned virtually every person who testified and – after all of that – Judge Haik found the testimony of the plaintiffs to be "**contrived**," "**orchestrated**," "**incredible**" and *un*credible.[1] Therefore, the second pillar allegedly supporting Petitioners' claims fell as a result of their own testimony at trial. Judge Haik, a seasoned federal trial judge (who has been on the federal bench for approximately 10 years,

1. *See*, for example, Judge Haik's comments at MJML Tr. pp. 13, 47, 49, 54 and 57. NOTE: Citations to the trial transcript will be abbreviated "TT." Citations to the transcript of the hearing on Apollo's Motion for Judgment as a Matter of Law will be abbreviated "MJML Tr." Citations to District Court Judge Richard T. Haik's Addition Reasons for Judgment will be abbreviated "ARJ," a copy of which is attached to Petitioners' Brief as Appendix "D."

and who had previously served as a state district court judge for approximately 7 years before his federal appointment) commented during trial that he felt that someone had "**hustled up all these cases**" because the plaintiffs "didn't like" the way there were getting paid, and once they were no longer working for Apollo they tried to "bite" Apollo in the "back." Tr. p. 929 and MJML Tr. p. 48. Furthermore, Judge Haik stated that there was no doubt in his mind that the plaintiffs had gotten together to "**contrive some kind of statement to show that they were treated unfairly**," and also stated that the testimony of the six plaintiffs whose cases were tried was the "**best orchestrated among plaintiffs I've ever seen in my life**." MJML, Tr. p. 54, ln. 9-23.

The final premise asserted by Petitioners is the suggestion that this Court should grant a writ of certiorari in this case. Nothing could be further from the truth – (i) there is no conflict between federal appellate court circuits on the legal issues presented; (ii) there is ample authority that the FLSA, the regulations on the FWW pay plan (29 C.F.R. 778.114) and the relevant opinion letters of the Department of Labor ("DOL") permit the occasional disciplinary deductions taken by Apollo from the FWW salaries of certain of the plaintiffs when faced with the willful absences of those plaintiffs; and (iii) the factual and credibility findings of the trial court are not appropriate for review by way of writ of certiorari.[2]

With the collapse of these three pillars, Petitioners' argument for the issuance of a writ of certiorari also falls. The trial judge – having the benefit of seven days of trial testimony – properly saw no reason for the case to proceed when plaintiffs rested and, accordingly, granted Apollo's motion for judgment as a matter of law.

---

2. Rule 10 of the Supreme Court Rules states that, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

STATEMENT OF THE CASE

A. Procedural Background

On or about May 27, 1997, George Samson and Kevin Smith filed the matter entitled "*George Samson and Kevin Smith v. Apollo Resources, Inc.*" bearing Docket No. 97-1053 against Apollo (this lawsuit shall be referred to herein as the "Samson Suit"). In November and December of 1997, plaintiffs amended their Complaint a total of four times in order to permit five more plaintiffs to join the Samson Suit, as well as to name Jeffrey A. Reddoch and his wife, Chiquita Reddoch, as individual defendants. On or about January 14, 1998, William Melancon (legal counsel for the plaintiffs in the Samson Suit) filed a lawsuit against Apollo on behalf of Crawford Norton and Lester Weaver encaptioned "*Crawford R. Norton and Lester D. Weaver v. Apollo Resources, Inc.*" bearing Docket No. 98-0062 (referred to herein as the "Norton Suit").

In early March of 1998, the parties agreed to consolidate for trial the Samson Suit and the Norton Suit (referred to herein as the "Collective Action"). The parties agreed to continue the trial date until January of 1999 (later moved to March 1, 1999), in light of Petitioners' desire to make the consolidated action a "collective action" under Section 216(b) of the FLSA. 29 U.S.C. § 216(b). Of the over 180 people to whom notification letters were mailed, only 25 additional people decided to join in as collective action members of the Collective Action.

The trial of the Collective Action was conducted from March 1, 1999, through March 9, 1999 (seven days of trial).[3] At the end of the fourth day of trial, Judge Richard T. Haik

3. In Petitioners' case-in-chief, they called the following persons to testify: the six plaintiffs (1) George Samson, III, (2) Jackie D. Hays, (3) Brent C. Manuel, (4) Kevin D. Smith, (5) Norman Landry, and (6) Melvin Kyle Smith, as well as (7) Don Strobel, a fact and expert witness listed by Apollo, and the following members of Apollo's management (8) Jeffrey A. Reddoch (President), (9) Johnnie Daughdrill (Operations Manager), (10) Ben Stonecipher (Administrative Manager), and (11) Charles E. Reeves (Controller), all under cross-examination.

suggested, in the interest of time, that the parties complete the trial for the claims of the six plaintiffs cases who had already testified and then sever the remaining 24 plaintiffs from the trial. The parties agreed.

At the close of Petitioners' case on March 9, 1999 (with respect to the six plaintiffs), Apollo moved the court for a judgment as a matter of law under Federal Rule of Civil Procedure Rule 52(c). After a two hour hearing on the motion, wherein the trial judge heard arguments and made detailed factual findings as to each individual plaintiff, Judge Haik granted Apollo's motion. Judge Haik followed up with Additional Reasons for Judgment, dated April 27, 1999, primarily discussing the legal basis for his ruling on the Rule 52(c) motion (*see* copy attached as Appendix "D" to Petitioners' Brief). A judgment was signed on April 27, 1999.

Petitioners filed an appeal with the Fifth Circuit Court of Appeals, which rendered its opinion on February 20, 2001, resoundingly affirming the decision of the trial court in all respects. Petitioners' petition for panel rehearing was denied on March 20, 2001.

B. Factual Background

Apollo is a Louisiana corporation which has its registered office in Lafayette, Louisiana. Apollo is in the business of providing environmental-related services to the oilfield industry. Jeffrey A. Reddoch is the president and sole shareholder of Apollo.

In 1991, upon being approached by an employee who questioned the way said employee was being paid, Mr. Reddoch immediately contacted the Wage and Hour Division of the Department of Labor ("DOL") to obtain assistance in implementing a pay plan which fit the needs of Apollo as well as complied with the FLSA. TT p. 9 and p. 14.

At that time, Don H. Strobel was the Assistant District Director for the United States Department of Labor in the Enforcement Section (New Orleans). TT p. 85-86. Mr. Strobel

went over the pay plan options and suggested the FWW pay plan. TT p. 14-15. Mr. Strobel forwarded a packet of materials to Mr. Reddoch regarding the FLSA, the FWW (including a copy of 29 C.F.R. 778.114) and related matters. TT p. 15 and p. 88. Mr. Reddoch read the materials and called Mr. Strobel several times over the next several months to discuss issues related to the FWW and its operation. TT p. 88 and p. 98. Mr. Strobel's instructions and explanations to Mr. Reddoch addressed, among other things, when the employer could legitimately take disciplinary deductions from the FWW salary, the fact that only a pro rata portion of the salary had to be paid in the initial and terminal weeks of employment and other such issues. TT p. 88-89.

Mr. Strobel remembered Mr. Reddoch particularly well because of his "good attitude" and the fact that he followed up with a "lot of telephone calls over the publications that we sent him." TT p. 119. Mr. Strobel stated that in his 32 years of experience, he has only encountered "very few" – "probably less than one percent" – of employers who behaved the way Mr. Reddoch did and showed such an attention to detail and interest. TT p. 119.

With regard to the issue of permissible deductions from the FWW salary, Mr. Strobel specifically instructed Mr. Reddoch in 1991 and 1992 that occasional deductions could be made as a disciplinary measure for willful absences or tardiness of the employee, in accordance with: (i) the DOL's Field Operations Handbook (Section 32b04b), a reprint of which is attached hereto as Appendix "A," and (ii) the 1982 opinion letter by DOL Administrator, William Otter (the "Otter Letter"), attached to Petitioners' Brief as Appendix "F." TT p. 49-50, 55-57, 74-75, 88-89 and 1140-1141.

The only person at Apollo authorized to make deductions from an employee's FWW salary is Mr. Reddoch. TT p. 1142 and p. 1165. A decision to make a disciplinary deduction for a willful absence is made by Mr. Reddoch only after securing the facts of the matter and enough information to feel "comfortable"

with the decision. TT p. 1198 and p. 1274. Disciplinary deductions are made infrequently because Apollo wants to try to retain its employees, but, on the other hand, there is a need to have an effective way to discipline employees who "play hooky"; otherwise, the message would go out that Apollo has an "open door policy" on playing hooky and getting paid for it. TT p. 1154 and p. 1273.

Apollo does *not* dock its employees' FWW salaries when they are truly sick; rather, it is Apollo's policy to continue to pay the salary of any employee under the FWW who is truly sick. TT p. 1144 and p. 1228. Apollo has paid the full salary of employees who were out for "over a month" when they were truly sick. TT p. 1144 and p. 1228.

Apollo has a policy requiring employees to bring in a doctor's excuse when they return to work after being absent from work due to sickness. TT p. 1151, p. 1155 and p. 1228. Lead plaintiff, George Samson, admitted that this policy was "generally known" by his coworkers at Apollo. TT p. 246. Although Apollo is generally "pretty lenient" with the doctor's excuse policy, adherence to this policy is particularly required when an employee (who alleges sickness as the reason for the absence): (i) does not call in and personally speak to the manager on duty on the day in question, but instead simply leaves word of the alleged sickness with the answering service; and (ii) that employee is not home to answer the manager's call either during the morning of the day in question or later that afternoon, which gives Apollo a "very good suspicion" regarding the employee's allegation of sickness. TT p. 1153-1156, p. 1252-1253, p. 1261-1262 and p. 1285-1287. In such an event, Mr. Daughdrill, Apollo's Operations Manager, "flags" the day in question on Apollo's attendance records for further investigation and the ultimate presentation of the matter to Mr. Reddoch for review. TT p. 1253 and p. 1287. Mr. Daughdrill is the one who personally makes these two calls (once in the morning and once again in the afternoon) to employees who fall into the suspicious absence category. TT p. 1254-1255 and p. 1285.

If Mr. Daughdrill does not have any reason to disbelieve the employee's allegation that the absence was because of sickness, he does not pursue the matter any further. TT p. 1286-1287. According to Mr. Strobel, who worked for the DOL for over 32 years, the "most common excuse" given by employees who "play hooky" is that they are "sick." TT p. 86 and 115.

There are only four of the six plaintiffs whose cases were tried in this matter who had any deductions made from their salary as disciplinary deductions for willful absences.[4] Judge Haik found, *as a matter of fact*, that all of these deductions were made because of willful absences by the employees in question, to-wit: "Apollo deducted from an employee's weekly salary when the employee willfully absenced himself from work." *See* ARJ (Section E), attached as Appendix "D" to Petitioners' Brief.

With regard to the near simultaneous unexplained absences of George Samson, Kevin Smith and Melvin Smith (the latter two plaintiffs who are brothers) – immediately before and after the same weekend[5] – Mr. Reddoch explained that other Apollo employees (as well as Mr. Daughdrill) had informed him that Mr. Samson and two other people (i.e., the Smith brothers) had missed days around the same weekend and had gone on a hunting or fishing trip and that none of these employees could produce a doctor's excuse.[6] TT p. 1158 and 1162. Mr. Daughdrill heard

4. To-wit: George Samson, III – one workweek involving 10.25 hours; (2) Kevin D. Smith – one workweek involving a total of 12.25 hours; (3) Melvin K. Smith – one workweek involving a total of 1.5 hours; and (4) Norman Landry – three workweeks involving a total of 17 hours.

5. I.e., the days involved were Thursday, October 19, Friday, October 20, Monday, October 23 and Tuesday, October 24, 1995.

6. Mr. Daughdrill explained, by way of example (regarding Melvin Smith's situation), that a notation of "sick" on Apollo's absentee roster is what he puts if "someone said they were sick" (TT p. 1259) – in essence, the notation is only reflective of what the employee *claims* was the reason for the absence, not in any way a determination by Apollo

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"lots of people" talking in the shop that George Samson, Melvin Smith and Kevin Smith had missed work because they were going on some sort of fishing or hunting trip.[7] TT p. 1258. Mr. Daughdrill told Mr. Reddoch of the information that he had received in this regard. TT p. 1258. Mr. Daughdrill testified that the story he heard about the three employees' absence was a "common rumor" throughout the shop. TT p. 1258. When this information started circulating, Mr. Daughdrill flagged the dates for Mr. Reddoch and Apollo started the investigation. TT p. 1259.

Mr. Reddoch testified that these three employees could not be located when Apollo tried to get in touch with them. TT p. 1166-1167. Mr. Daughdrill and Mr. Reddoch testified that Mr. Daughdrill asked *all three* of these employees to bring in a doctor's excuse upon their return to work, but that *no* such excuse was ever produced.[8] TT p. 1160, p. 1164, p. 1167, p. 1183-1185 and p. 1271-1272. Mr. Reddoch explained that the three employees (George Samson, Kevin Smith and Melvin Smith) left on days that Apollo needed them to work and that Apollo could not find these employees on the days in question. TT p. 1163.

With respect to the deductions from Norman Landry's salary, the first date in question was on April 10, 1995. TT p. 888. Mr. Landry admitted at trial that on the day in question he was "moving." TT p. 888. Mr. Landry conceded that: (i) this was not a day that he showed up for work, (ii) that he was willing

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of the truth of that alleged reason. In fact, Apollo, with good reason, questioned the legitimacy of the alleged reason of "sick" for the employees at issue. TT p. 1158, 1162-1167 and p. 1258.

7. Mr. Reddoch explained that the Smith brothers and Mr. Samson are "very close" to each other. TT p. 1166.

8. Judge Haik stated that he was: (i) "very impressed" with the testimony of Mr. Reddoch; and (ii) "very, very impressed" with the testimony of Mr. Daughdrill, as well as "impressed with his demeanor." MJML Tr. p. 21 and p. 64.

to give up that day's pay to go move, (iii) that he did not ask his supervisor, Mr. Daughdrill, if he was going to get paid for the day in question that he moved; (iv) that he knew that there was work for him at Apollo on the date in question; (v) that Mr. Daughdrill never told him that the day in question would be an excused absence; and (vi) that he did not ask Mr. Daughdrill if he was going to get paid for the day that he moved. TT p. 888-891 and p. 909-910.

The second date in question where Mr. Landry's salary was subject to a disciplinary deduction was on July 5, 1995. TT p. 892. Although Mr. Landry alleged at trial that he had gone to the doctor on that date, Mr. Landry admitted that he did not show up for work on that date, which just so happened to be the day following the July 4th holiday. TT p. 892. Mr. Landry conceded that: (i) there was work for him at Apollo on that date in question; (ii) no one from Apollo told him that the date in question would be an excused absence; (iii) not even after he saw that his salary had a deduction against it for that week did he bring any type of doctor's excuse or independent verification of his claim that he was at the doctor on that date; and (iv) nothing prevented him from going to get some type of doctor's slip to show Apollo that he was, in fact, at the doctor on that date. TT p. 892-893.

The final date involving a deduction from Mr. Landry's salary was August 11, 1995. Mr. Landry conceded that this was the day in which he took a "personal day off" – "a little vacation day" where he took his family to New Orleans. TT p. 871 and p. 895. Mr. Landry conceded that: (i) he had only worked for Apollo for less than six months at this time; (ii) he did not have any vacation time to be used for this personal day off; (iii) he would not dispute that Apollo did, in fact, have work for him to do; and (iv) no one in Apollo's management told him that the dates in question were excused or that he was going to be paid for any of the days that he decided to take off. TT p. 895-896 and p. 912. Judge Haik did not believe that *even Mr. Landry* really thought he would get paid for the absence

when he took his family on vacation.[9] MJML Tr. p. 49. Other than his own unbelievable testimony, Mr. Landry offered no evidence at trial to support his allegations.

Mr. Daughdrill testified that he never told either George Samson, Kevin Smith, Melvin Smith or Norman Landry that the days they were willfully absent were "excused." TT p. 1271 and p. 1281. Additionally, Mr. Daughdrill confirmed that there was work at Apollo for all of these men on the dates of their willful absences. TT p. 1281.

In connection with this subject matter, Judge Haik offered the following comments and factual findings:

> I find it **incredible** to believe that Mr. Landry or any of the plaintiffs who felt that they should have gotten paid because they were sick did not try to have that situation corrected at that time, or at least at the time of their next paycheck. These are not babies. They're not children. They're not infants. If in fact and indeed they could have gotten or they did get doctor's excuses some two and a half years later, how much easier could it have been to make the phone call and get it then when they saw that their salaries were deducted when in fact they and others knew that when they brought in sick slips or doctor's excuses, they got paid for that time? But to come back years later and say, wait a minute, no one ever told me is just **incredible** to me. Even a child, when they don't go to school, when they check back in has to bring some type of slip from a mom or dad or a doctor to

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9. To show the extent of Mr. Landry's lack of credibility, a review of pages 896 through 900 of the trial transcript would be *quite* illuminating, since this is where Mr. Landry was *repeatedly* impeached with his deposition (which was taken just two months prior to trial). He testified, either live or in his deposition, that he *expected* to be paid by Apollo if he took days off from work to go shopping, to wash his car, to paint his house or even to go bird watching! For good reason, Judge Haik disbelieved Mr. Landry's testimony.

show that that child was not playing hooky. What they were concerned about here is playing hooky from work, and when you play hooky from work and you can't back it up, the company has a right to deduct. It's not fair to play hooky and get paid, just like it's not fair to play hooky and go to school and not be disciplined in such a manner. It's just not fair. MJML Tr. p. 47-48. [Emphasis added].

There is no doubt in my mind that Mr. Norman Landry, as well as the other plaintiffs in this case, were treated fairly. I find it **astonishing** that they don't realize – or that they can take the stand and say I didn't realize I had to get a slip, a work slip. The testimony was if someone called and talked to Mr. Daughdrill or someone else of some authority besides the answering service, they would call. And if they verified that person was home sick, they didn't have to get a work slip. But if they called and no one was there, they got docked in pay. That's not unreasonable. That's not an unreasonable thing to do. MJML Tr. p. 49. [Emphasis added].

So I think it is incumbent upon the employee when they see that they're docked – I think it is incumbent upon them to show some reason why they shouldn't be at that point. And all they had to do was bring in a doctor's excuse. And they're going to get it two years later? **That's incredible to me. That's incredible.** MJML Tr. p. 50. [Emphasis added].

And to have to believe that the company has to go chase them down and say please bring in your sick slip, you know, you do that to third graders. You don't do it to ninth graders or high school kids. You don't do it to a high school graduate. You don't do it to grown men who have worked before. You

> don't do it. You expect grown men if they have a complaint and they say I didn't get paid and I was sick, to check it out. MJML Tr. p. 60-61.

It should be noted that all of the plaintiffs claiming any disciplinary deductions from their salary signed a sheet in connection with their initial employment orientation which was captioned, "DISREGARD OF ANY OF THE FOLLOWING RULES MAY SUBJECT YOU TO DISCIPLINARY ACTION OR DISCHARGE." TT p. 240-242 (George Samson), p. 966-967 (Kevin Smith), p. 901 (Norman Landry) and p. 811 (Melvin Smith). Item number 12 of the reasons for discipline that were printed on that sheet read as follows, "*Unexcused or excessive absences or tardiness.*" *See* Defendants' Exhibits Samson No. 1, Kevin Smith No. 29, Landry No. 23 and Melvin Smith No. 17A. Therefore, these employees had notice from the start of their employment that, in certain circumstances, disciplinary action could potentially be taken against them by Apollo for unexcused absences.

It is *undisputed* that Apollo does not make a deduction every time an employee is absent from work. TT p. 1140-1141. Petitioners' counsel even admitted on the record that they had no evidence of same to present at trial. TT p. 1140-1141.

The evidence at trial, in fact, showed that of the total hours worked by all of the original 30 plaintiffs while they were employed by Apollo (38,258.75 hours), only about half of them (16) had any disciplinary deductions at all, said deductions (involving 306.25 equivalent hours[10]) which involved *less than 1%* of the total number of hours worked by these 30 plaintiffs. Disciplinary deductions were only present in 33 workweeks of the total of 798 weeks (including initial and terminal weeks) worked by the original 30 plaintiffs. **There were 20 weeks (involving 800**

10. The term "equivalent hours" is used merely to indicate how many hours for which the employee was not paid during that workweek (i.e., deducted for disciplinary reasons) and is calculated by subtracting the actual number of hours worked by the employee during that workweek from the sum of 40 hours.

equivalent hours) in which the original 30 plaintiffs did *not* perform any work at all, but in which Apollo paid their *full* FWW salary. Further evidence at trial established that the value of the equivalent hours deducted from any of the original 30 plaintiffs' salaries ($3,839.81), when compared against the value of the time that the original 30 plaintiffs did *not* perform 40 hours of work during a workweek but, in fact, received their *entire* FWW salary ($29,814.87), *benefitted* the original 30 plaintiffs in the amount of $25,975.06 in the aggregate. TT. p. 1401-1403; Defendants' Exhibit Reeves No. 71.[11] This pay system was obviously a good one as these numbers clearly show.

With regard to the six plaintiffs whose cases were tried, the evidence showed that only 41 equivalent hours were involved in deductions which occurred in a total of just six workweeks (from a total of 183 total workweeks during the six plaintiffs' employment with Apollo), amounting to just 3.3% of the total workweeks in question for said plaintiffs. Additionally, the equivalent hours involved (41 hours) in the disciplinary deductions made to the FWW salary of any of these six plaintiffs amounted to an incredibly low 0.45% (less than 1%) of the total hours worked (9,094.50) by these plaintiffs while employed by Apollo. TT p. 1394-1396 and p. 1426; Defendants' Exhibit Reeves No. 70.

Mr. Strobel, the wage and hour expert who was called to testify by Petitioners during their case-in-chief, testified that the disciplinary deductions made by Apollo with regard to the 30 plaintiffs were unquestionably "occasional" under applicable DOL authority, and were only made for "disciplinary"

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11. Judge Haik took notice of the fact that the plaintiffs did not "complain" when they received their full salary but did not work 40 hours during that workweek — which is the other side of the equation, i.e., the trade off. MJML Tr. p. 30-31. All of the six plaintiffs (except Mr. Manuel) had weeks where they did not work 40 hours but were paid their full salary. *See* MJML Tr. pp. 14, 21, 38-39, 46-47 and 57-58.

reasons – certainly not based on any desire on Apollo's part to "save money." TT p. 108-111.

Mr. Strobel also testified that he performed a review of Apollo's pay policy and found that it complied with applicable statutes and regulations – in fact, Mr. Strobel testified that Apollo was "over generous, over and above what the law required." TT p. 137.[12]

Judge Haik, after the presentation of the entirety of the six plaintiffs' cases, found, *as a matter of fact*, that Apollo did everything it could to comply with applicable law, to-wit:

> Number one, there has been no showing at all in this case thus far that Apollo's actions were willful and, in fact, all of the testimony except for – I can't even say that – even the plaintiffs themselves, although they would like to paint it in the light of willfulness, **all of the testimony is clear to me that there was no willfulness, that the company tried to do everything they could to follow the law, and it went over and above**. MJML Tr. p. 12, L 1-10. [Emphasis added].
>
> **This company dotted their Is and crossed their Ts.** MJML Tr. p. 22, L 2-3. [Emphasis added].
>
> And I have to say, Mr. Reddoch, I was impressed with your testimony. **I think you are trying to run a good shop, and I think you've done everything that you can do to keep it on the up and up.** MJML Tr. p. 64, L 16-19. [Emphasis added].

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12. Mr. Strobel informed the court that, while he was with the DOL, he was involved in a case where some other employer was not using the FWW pay plan properly and that he required the employer to pay. TT p. 140. Therefore, Mr. Strobel's credibility — as the only expert on wage and hour regulations who testified during the trial and whose expert status Petitioners' counsel stipulated to on the record (TT p. 40) — cannot be validly challenged. Petitioners' lawyer conceded on the record that Mr. Strobel's testimony "hurt" Petitioners' case. TT p. 1303.

> I'm a firm believer of receiving what you contract for, and **I think these gentlemen received every penny they contracted for. And some of them even more than they thought they contracted for.**" MJML Tr. p. 65. [Emphasis added].

None of the plaintiffs whose cases were tried contended that their overtime premium was not properly calculated and paid by Apollo pursuant to 29 C.F.R. 778.114; rather, these plaintiffs wanted the entire pay plan thrown out.

Petitioners' solitary offering to the trial court to try to cast Apollo in a bad light with regard to its pay plan was the botched DOL investigation occurring in 1994-1995, which the DOL aborted and did not legally pursue. The only wage and hour expert to testify at trial (Mr. Strobel) disagreed "big time"[13] with the DOL's suggestions that Apollo did anything wrong, since his review of the records showed that Apollo was not in violation of the FLSA. Mr. Strobel agreed with the characterization of the DOL investigation at issue as "poor," "bogus," "seriously flawed," "terrible," and a "rotten job." TT p. 84, p. 98 and p. 107. In connection with his interaction with the DOL in 1995 on behalf of Apollo (during the time when he had a private consulting practice), he tried to get the DOL to come back in and conduct a more complete investigation, in part by sending them memorandum after memorandum "begging – literally begging them to come back in." TT p. 32-33. Mr. Strobel did not want the DOL to take his word for it, but to come back in and look at the records, re-interview witnesses and confirm that errors had been made in their investigation. TT p. 32-33. The DOL refused to come back to Apollo for more information and the DOL's lead investigator, Frank McGriggs, "blew off" Mr. Strobel's request. TT p. 104.

Mr. Strobel informed the court that the DOL felt its allegations against Apollo were so "shaky" that the DOL

13. Transcript pages 98 through 104 shows a partial list of reasons for Mr. Strobel's substantial disagreement with the botched investigation of Apollo by the DOL.

"walked away" from the matter without even presenting the case to its own attorney (Solicitor of Labor) for further consideration, which, Mr. Strobel – in his 32 years of experience with the DOL – had only seen happen in about 12 cases of the 1,500 or so of which he had come into with contact during his DOL tenure. TT p. 28 and p. 123-124. The DOL *never* sent Apollo a letter demanding payment of the over $300,000 which its botched investigation claimed was allegedly owed. TT p. 104.[14] Nonetheless, the New Orleans office of the DOL took "statistical credit" for the big numbers it claimed to have found for employees in order to get "brownie points" with its superiors in Washington, D.C. TT p. 86-87 and p. 104-105. Mr. Strobel explained to the district court that the DOL even prepared a "correction" sheet for its file that showed that Apollo owed "zero." TT p. 105.

All of Mr. Strobel's testimony regarding the facts and nature of the referenced DOL investigation was *uncontroverted* at trial. Other than Mr. Strobel (who "hurt" Petitioners' case), Petitioners did not even bother to call any past or present DOL employees to testify at trial, presumably because Petitioners realized these witnesses would not help their case. Apollo contests any of Petitioners' factual representations in their Brief in contradiction of the evidence and facts set forth above.[15]

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14. The "standard" letters were not even mailed to the employees – but, rather, "modified 16(b)" letters were sent which did not state that monies were owed to the employee (rather, "may" was used), TT p. 26-27.

15. Pursuant to Supreme Court Rule 15.2, Apollo's legal counsel hereby points out the following additional perceived misstatements in the petition for writ of certiorari: (1) contrary to the assertion made in footnote 7, there was no testimony at trial to support any allegation of "safety problems" with respect to the issue addressed therein; (2) contrary to the assertion on page 5, Norman Landry was not "granted a vacation day"; (3) contrary to the assertion on page 6, Apollo never told its employees at the time of hiring that they would "average only 40 hours per week" — the trial judge did not find that any such

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REASONS FOR DENYING THE WRIT APPLICATION

A. Department of Labor Regulation Interpretation

Petitioners argue that the trial court and the court of appeals substituted their own interpretation for the interpretation of the DOL with regard to 29 C.F.R. 778.114. This argument is completely without merit, since these courts did not substitute their interpretation but rather merely *followed* an interpretation by the DOL of the FWW.

Section 778.114 provides that an employee paid a salary under the fluctuating workweek method must receive a fixed salary "for whatever hours he is *called upon to work*, whether few or many." Petitioners ignore the wording of the regulation and argue that employees can choose not to work when called upon to work and still receive a full salary for the workweek. Petitioners base this argument on Wage & Hour Opinion Letter No. 479, issued by the DOL in 1966 (attached to Petitioners' Brief as Appendix "E"), which stated that no deductions can be made from the salary of employees paid using the FWW pay plan. Petitioners suggest in their Brief that two district court opinions have cited to Letter No. 479 as "being good law." This statement is incorrect. Although one of these courts, the Southern

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misrepresentations existed; (4) contrary to the assertion on page 6, these plaintiffs did not "typically" earn "$500 per week" – the beginning base salaries of the six plaintiffs (not even considering their overtime premiums) averaged $2,316 per month; (5) contrary to the statement made in footnote 12, Apollo never admitted at trial that the DOL was following the dictates of DOL opinion letter No. 479; (6) contrary to the assertion on page 8, the courts did not fail to "acknowledge" that the DOL investigated Apollo, rather the courts disbelieved the alleged results of the botched investigation; (7) contrary to the assertion made in footnote 16, Apollo's expert did not testify that Apollo was "wanting its cake and eating it too," rather he testified that Apollo was properly paying its employees under the FWW; (8) contrary to the assertion on page 16, these employees were certainly not held "hostage in their employment by Apollo;" and (9) contrary to the assertion on pages 17-18, Melvin Smith did not testify that Safeguard Disposal Systems was his "current" employer.

District of New York, did cite to Letter No. 479, the other court specifically cited to Letter No. 479 and categorically *refused* to follow it, noting that disciplinary deductions are permissible. *Yourman v. Dinkins*, 865 F. Supp. 154, 164-65 (S.D.N.Y. 1994), *aff'd*, 84 F.3d 655 (2d Cir. 1996), *rev'd on other grounds*, *Giuliani v. Yourman*, 519 U.S. 1145 (1997); *Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 895 n.24, 25 (E.D. Tex. 1997).

Petitioners suggest that both the district court and the court of appeals incorrectly followed the more recent opinion letter issued in 1982, referred to throughout this litigation as the "Otter Letter," which was drafted by former DOL Administrator William Otter (a reprint of which is attached to Petitioners' Brief as Appendix "F"). The "Otter Letter" provides that, although generally the full salary must be paid as long as an employee performs any work in a workweek, **"[o]ccasional deductions may be made as a disciplinary measure for willful absences or tardiness."** Thus, Petitioners do not argue that the district court failed to follow an interpretation of the DOL which should be given persuasive authority; rather, Petitioners simply argue that the district court should have chosen a *less recent* interpretation issued by the DOL.

The district court correctly decided to follow the more recent opinion letter as to the permissibility of disciplinary deductions. Importantly, consistent with the "Otter Letter," the DOL's Field Operations Handbook – used by agency employees in enforcing compliance with the FLSA – provides that occasional disciplinary deductions for willful absence or tardiness may be made. *See* Field Operations Handbook, ¶32b04b, a reprint of which is attached hereto as Appendix "A." Mr. Strobel, the wage and hour expert, testified at trial that the DOL opinion letter relied upon by Petitioners (No. 479) was superceded by the 1967 change in the DOL's Field Operations Handbook, as well as by the 1982 "Otter Letter." TT p. 93.

Under the FLSA, an employer is clearly permitted to make certain deductions, or pay less than the full salary, in connection

with occasional disciplinary deductions for willful absences or tardiness. *See Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884 (E.D. Tx. 1997), (holding that numerous deductions made at "irregular intervals of time" as to five plaintiffs was insufficient to prove that the use of the FWW method of paying overtime was invalid); *see also* Field Operations Handbook, ¶32b04b (attached as Appendix "A" to this Brief); DOL, Wage and Hour Opinion Letter, May 26, 1982 (Otter Letter), attached as Appendix "F" to Petitioners' Brief; and DOL, Wage and Hour Opinion Letter, No. 988, 1969-73 Wages & Hours (CCH) ¶30,531 (May 1, 1969). The evidence at trial conclusively showed that disciplinary deductions were *occasional* under any definition and that each disciplinary deduction by Apollo was made for a willful absence or tardy.[16]

Quite surprisingly, Petitioners failed to cite to this Court the *most recent* Wage & Hour Opinion Letter on the subject of disciplinary deductions from the FWW pay plan salary. This DOL opinion letter, issued on May 28, 1999, sets forth the *same interpretation* as that set forth in the Otter letter and in the Field Operations Handbook – i.e., that occasional disciplinary deductions may be made for willful absences or tardiness. *See* 5/28/99, DOL Opinion Letter, 1999 WL 1002415, a reprint of which is attached to this Brief as Appendix "B." Thus, the most recent pronouncement of the DOL on the referenced issue supports the district court's and the court of appeals' holding that occasional disciplinary deductions may be made from the salary of FWW employees.

Both the district court and the court of appeals applied an interpretation of the subject regulation that has received DOL

16. As correctly noted by the Fifth Circuit Court of Appeals in its opinion in this case, even though 29 C.F.R. 778.114 provides for a fixed salary as "straight time pay for whatever hours [the employee] is called upon to work in a workweek," this does *not* mean that the employer must pay the full salary even though the employee decides not to work all the hours he is called upon to work. To hold otherwise, warned the Fifth Circuit, "would allow for a tremendous abuse of the FWW method by employees."

and judicial approval. Given that this interpretation is permissible and given the lack of other appellate court decisions weighing in on this issue, this matter is not ripe for decision by this Court.[17]

With regard to Petitioners' argument that the district court and the court of appeals should have asked the DOL to file an amicus brief in order to set forth its interpretation of the relevant regulation and opinion letters, it should be noted that Petitioners never requested the Fifth Circuit Court of Appeals to do so. Moreover, undersigned counsel does not recall such a request being made by Petitioners to the district court.

Nevertheless, why should the DOL have been asked to file an amicus brief when the district court and the court of appeals are undoubtedly authorized and empowered to read and interpret regulations and opinion letters issued by federal agencies, and do so every day of the week in cases across the country. It is not practical to suggest that each such federal court would be required to ask the particular federal agency that promulgated the regulation or opinion letter at issue in the matter to file an amicus brief. Such a paper intensive standard would unnecessarily drain precious resources from both the referenced federal agency, as well as from the federal judiciary. Moreover, Petitioners' protestation that an amicus brief should have been requested of the DOL on the subject issue is rendered moot by the most recent DOL opinion letter, which expressly permits an employer's occasional disciplinary deduction from the salary of workers paid under the FWW pay plan (*see* copy of said opinion letter attached to this Brief as Appendix "B").

17. It is interesting to note that the DOL opinion letters attached to Petitioners' Brief as Appendix G, Appendix H, Appendix I and Appendix J, were never cited to or presented by Petitioners to the district court or to the court of appeals. Thus, to suggest in their Brief that these referenced courts simply "ignored" such DOL opinion letters is misleading; rather, it was *Petitioners* who apparently ignored these DOL opinion letters until the time they filed their Petition for Writ of Certiorari with this Court. Nevertheless, the most recent DOL opinion letter supports Apollo's position in this case.

B. No Considerations Exist for Granting Writ of Certiorari

On page 11 of their Brief, Petitioners state that the Fifth Circuit Court of Appeals' opinion in the case at bar is the *only* decision by any federal court of appeals with regard to disciplinary deductions from the salary of workers paid pursuant to 29 C.F.R. 778.114. Petitioners argue that this fact *justifies* this Court's grant of a writ of certiorari. Apollo submits that exactly the *opposite* is true.

Under Rule 10 of the Supreme Court Rules, the primary focus of the considerations governing review of a petition for writ of certiorari is the presence of conflicts between or among the federal appellate circuits (which is not present in this case) and/or between or among the state courts of last resort when involving important federal questions (which is also not present in this case). The only basis left, therefore, for Petitioners to argue for a writ of certiorari is under subpart (c) of Rule 10, which requires a finding that a federal (or state) appellate court has decided an important question of federal law that has not been, but should be, settled by this Court. Unfortunately for Petitioners, such a situation does not exist in the present matter.

This Court should allow the federal courts of appeals adequate time to reach conclusions and resolve the issues complained of by Petitioners, instead of stepping in to write on a relatively clean judicial slate. For this Court to step in and decide matters of substantially first judicial impression would deviate from the standard set forth in Rule 10 of the Supreme Court Rules (which states that writs of certiorari should be granted "only for compelling reasons"). Moreover, there is no reason for this Court to grant a writ of certiorari when the only federal appellate court decision on the issue of disciplinary deductions from salaries of employees paid under the FWW play plan (i.e., the Fifth Circuit's decision in the case at bar) is *entirely consistent* with the DOL's most recent opinion letter on the subject matter, as well as with the DOL's Field Operations Handbook (*see* Appendix "B" and Appendix "A" to this Brief, respectively).

Petitioners' argument that "it is rarely economically feasible for attorneys to take these cases on a contingency fee basis" is belied by the fact that Petitioners' counsel has contingency fee contracts with all of the Petitioners in the present matter. In the past decade, undersigned counsel has defended at least than two other clients in FLSA collective actions where the plaintiffs were represented by legal counsel on a contingency fee basis.

Petitioners' statement that "wage and hour cases do not qualify for class action status" is misleading, since, as this Court is well aware, the FLSA authorizes "collective actions" for such claims under § 216(b). In collective actions, potential plaintiffs are permitted to "opt in" to the litigation after mailing of notification letters regarding the pending litigation. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 164, 110 S. Ct. 482 (1989).

C. *Auer* Decision Not Applicable to 29 C.F.R. 778.114 Pay Plans

Petitioners next argue that the reasoning of this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), should be found applicable to those workers who are paid pursuant to the FWW pay plan under 29 C.F.R. 778.114. This argument lacks merit.

In *Auer*, this Court addressed the issue of deductions from the salary of employees who are *completely exempt* from overtime requirements under the "white collar exemption" of the FLSA pursuant to 29 U.S.C. § 213(a)(4). *See also* 29 C.F.R. 541.118. The situation of salaried, exempt employees (who are paid *no* overtime at all, regardless of the number of hours worked) is *completely different* from the situation of employees paid using the FWW who are, in fact, paid overtime calculated in accordance with 29 C.F.R. 778.114. In *Auer*, this Court validated regulations promulgated by the Secretary of Labor that provide that employees who are exempt from the overtime requirements cannot have disciplinary deductions made from

their salary, except for infractions of safety rules of major significance.[18] The Court further held that for these salaried, exempt employees who receive *no overtime*, either making improper deductions or having a policy creating a significant likelihood that these deductions can be made can cause the overtime exemption to be lost.

In its opinion in *Auer*, this Court interpreted 29 C.F.R. 541.118 of the regulations, which explains the term "salary basis" for the white collar exemption. The FLSA, under the provision providing for the white collar exemption, requires that employees completely exempt from the overtime requirements be paid on a "salary basis." 29 U.S.C. § 213(a)(1). The DOL regulation interpreting this provision applicable to employees who are paid no overtime provides that

> an employee will be considered paid "on a salary basis" . . . if under the employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of this compensation, which amount is *not subject to* reduction because of variation in the quality or quantity of work.

Auer v. Robbins, 519 U.S. 452, 455, 117 S. Ct. 905, 909 (1997) (emphasis added). *See also* 29 C.F.R. 541.118. Thus, when this Court upheld the Secretary of the Labor's view that merely being "subject to" impermissible deductions could cause the loss of an exemption, it was actually interpreting and using language of a regulation specifically designed for and addressing the white collar exemption. This language is not present anywhere in the regulation addressing the FWW. *See* 29 C.F.R. 778.114.[19]

18. Of course, as discussed above, the DOL — in opinion letters and the Field Operations Handbook — has stated that occasional disciplinary deductions can be made from the salaries of employees paid using the FWW pay plan.

19. The term "salary basis" is used in 29 C.F.R. 778.114; however, as explained in *Cash v. Conn Appliance, Inc.*, 2 F. Supp. 2d 884 (Cont'd)

For these reasons, the *Auer* decision should not be expanded beyond its original holding to apply to employees paid using the FWW. This Court expressed no desire in the *Auer* decision for such an expansion, and the language of this decision does not call for one.

As the district court held in its well-reasoned opinion in the present matter, the principles outlined in the *Auer* decision for employees exempt from overtime requirements under 29 C.F.R. 541.118 do *not* apply to employees paid using the FWW. In their Brief, Petitioners have not cited to any cases that support a contrary conclusion.

In fact, in support of Apollo's position, the court in *Cash v. Conn Appliance, Inc.*, 2 F. Supp. 2d 884, 904-05 (E.D. Tex. 1997), held that the rules for salaried, exempt employees under the white collar exemption to the FLSA do *not* apply to employees paid using the FWW, based on the structure and text of the DOL regulations and on the legislative history of the regulations. Specifically, the *Cash* court found that the legislative history and the regulations lead to the conclusion that there was a distinct attempt by the Administrator of the DOL in promulgating the regulations to distinguish "salaried exempt employees falling within the white collar exemption from other workers who receive salaries." *Id.* at 905. The court further stated that the text and the history of the regulations lead to the conclusion that "[t]hey establish Section 541.118(a) as a mechanism to separate salaried employees coming within the white collar exemption from salaried employees falling beyond that exclusion, such as those whose overtime compensation is calculated using the fluctuation workweek method." *Id.*

Thus, the district court in the case at bar correctly followed the well reasoned opinion of the federal district court for Eastern District of Texas in finding that the regulations for employees

(Cont'd)

(E.D. Tex. 1997), the Secretary of Labor did not intend that the rules for salaries applicable to exempt employees apply to employees paid using the FWW.

exempt from overtime requirements do not apply to employees paid overtime under the FWW. Nevertheless, the district court in the present matter was never forced to reach the issue of whether the principles laid out in the *Auer* case applied to the FWW for very important reasons. Most importantly, the trial court made the factual finding that Apollo employees were not in fact "subject to" any *improper* deductions, nor were any improper deductions made from the salaries of the six plaintiffs. With this factual finding, the issue of whether the principles outlined in the *Auer* decision applied to FWW employees did not have to be reached; thus, they should not be considered in connection with this application for writ of certiorari.

Despite the district court ruling that the more stringent rules for deductions for employees who are completely exempt from overtime pay requirements (under 29 C.F.R. 541.118) did not apply to employees paid using the FWW, it went a step further and found that *even if* these rules did apply, Apollo's method of making deductions *met* these rules as well, again leading to the conclusion that Apollo employees were *not*, in fact, "subject to" any improper policies on deductions. *See* ARJ p. 19. Thus, even under the principles outlined in the *Auer* decision, the district court found that Apollo's use of the FWW was proper. Petitioners are therefore basically requesting this Court to grant a writ of certiorari so that it can issue an *advisory* opinion (completely mooted out by findings of fact at the trial). Such a request by Petitioners is certainly not justified under Rule 10 of the Supreme Court Rules.

D. No Need to Revisit *Overnight Motor* Decision

The Petitioners set forth an emotional plea (under the guise of the *blue-collar* employee versus the *powerful* employer) for this Court to revisit its decision in the case of *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942), but there is no reason to do so. The *Overnight Motor* case has been cited and relied upon by countless federal courts for almost 60 years. In effect, Petitioners are asking this Court to issue either an advisory opinion (since the trial court made findings of fact

that all actions of Apollo were justified and proper) or to promulgate a judicial amendment to long-standing law and regulation (by adding qualifications and/or restrictions to either the FLSA or to 29 C.F.R. 778.114).

The obvious motive for Petitioners' referenced plea is because they do not like the well-established case law to the effect that FWW pay plans comply with the FLSA. Under the FWW, an employee receives a fixed salary for all hours worked in any workweek plus one-half times (instead of one and one-half times) the "regular rate of pay"[20] for all hours worked over 40 in any workweek.[21] 29 C.F.R. 778.114. The regular rate of pay is determined by dividing all hours worked in a workweek into all salary for that workweek. *Id.* Contrary to Petitioners' statements in brief, employees paid pursuant to the FWW do, in fact, effectively receive time and one-half for all overtime hours – i.e., the salary covers the "time" and the overtime premium calculated in accordance with 29 C.F.R. 778.114 covers the "one-half." In discussing the regular rate of pay, this Court stated almost 60 years ago that:

> [I]t is true that the longer the hours the less the rate and the pay per hour. This is not an argument,

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20. The regular rate of pay is defined by the Administrator of the Wage and Hour Division as a "rate per hour." *See* 29 C.F.R. 778.109. Generally, the regular rate is determined "by dividing . . . total remuneration for employment (except for statutory exclusions) in any workweek by the total number of hours actually worked by [the employee] . . . in that workweek for which such compensation was paid." *Id.* A "workweek" is a fixed and recurring seven consecutive twenty-four hours, as set by the employer. 29 C.F.R. 778.105.

21. For example, if an employee has a salary of $500 per week and that employee works fifty hours in one workweek, the regular rate of pay for that employee for that workweek would be $10 per hour. For all hours worked over forty by that employee in that workweek (i.e., ten hours), that employee would receive an additional one-half of the regular rate of pay or $5. Thus, the employee's pay for all overtime hours during said workweek would actually be $15 per hour.

> however, against this method of determining the regular rate of employment for the week in question.

Overnight Motor, supra.[22]

Petitioners assert on page 15 of their Brief that this Court created a "narrow exception" to the FLSA in the *Overnight Motor* case. This statement is misplaced since the FWW is not an *exception* to the FLSA, but is an *alternate method* of complying with the federal statute. *See Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976), ("The application of the 'fluctuating workweek' formula is not at all dependent upon a finding that the employer is entitled to the *exception* commonly known as the 'Belo' provision."); *Bailey v. County of Georgetown*, 94 F.3d 152, 154 at n.5 (4th Cir. 1996), (778.114 is not an "exception" to the FLSA, but rather an alternate means of complying); and *Flood v. New Hanover County*, 4 Wage and Hour Cases 2d (BNA) 139 (4th Cir. 1997), ("778.114 does not represent an 'exception' to the FLSA").

Petitioners argue that the Fifth Circuit Court of Appeals decision in the present case has "eliminated" the guaranteed salary requirement under the FWW. Nothing could be further from the truth, since the Fifth Circuit merely agreed with the DOL's Field Operations Handbook and its opinion letters which allow occasional disciplinary deductions to be taken from the salaries paid to employees pursuant to the FWW. If the employee does not willfully absent himself from work (thus causing the employer to consider an occasional disciplinary deduction), then said employee will be paid his full FWW salary for the week in question.

Petitioners' arguments that Apollo's pay plan gave it a competitive advantage over its competitors is totally without merit. The district court specifically found that Apollo did nothing wrong and, in fact, paid the plaintiffs everything they

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22. As noted by the district court in the case at bar, the particular employees before this Court in the *Overnight Motor* case averaged 65 hours of work per week.

were owed – and even more. MJJL Tr. P. 65. Thus, Petitioners' attempt to use such generalized policy arguments are misplaced under the detailed factual findings in this case.

CONCLUSION

For the reasons set forth above, Apollo prays that Petitioners' application for writ of certiorari be denied. Petitioners' plea to either have this Court overrule its *Overnight Motor* case, or to embrace their position that playing "hooky" should have no consequences, in the work place should be rejected.

Respectfully submitted,

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APPENDIX

APPENDIX A — DOL FIELD OPERATIONS HANDBOOK ¶ 32b04(b)

32b04b *Irregular hours worked.* (a) If an employee is given a stipulated salary with the understanding that it constitutes straight time pay for all hours he works, and if his hours of work fluctuate from week to week, his regular rate of pay ordinarily will vary form week to week in accordance with the number of hours worked each week. The regular rate, of course, cannot be less than the applicable MW. Since straight time compensation has already been paid, such an employee must receive additional OT compensation for each OT hour in a particular w/w computed at not less than one-half the regular rate obtained by dividing the weekly salary by the number of hours worked in that w/w. If the employer to avoid weekly computations chooses to pay extra half-time based on the salary divided by 40 hours, such a method is permissible.

(b) The above rule will apply where an employee works a varying number of hours, and normally receives his full salary regardless of how few the scheduled hours may be in a particular week, even though *occasional* disciplinary deductions for wilful absence or tardiness are made. Disciplinary deductions, of course, may not cut into the MW or OT pay required by the Act.

(c) Similarly, an employee employed on a fixed salary basis for irregular hours of work may be paid a pro rata share of his salary in the initial or terminal week of his employment, when he is not in payroll status for the entire week.

APPENDIX B — DOL OPINION LETTER DATED MAY 28, 1999

Wage and Hour Division
United States Department of Labor
Opinion Letter
Fair Labor Standards Act (FLSA)

May 28, 1999

* * *

This is in response to your letter concerning the application of the fluctuating workweek method of paying overtime. We regret the delay in responding.

Under section 778.114 of Interpretative Bulletin, 29 C.F.R. 778, an employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than working for 40 hours or for some other fixed weekly work period, such a salary agreement is permitted by the Fair Labor Standards Act (FLSA) if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for

all overtime hours worked at a rate not less than one-half the employee's regular rate of pay. This is often referred to as the fixed salary for fluctuating hours or the "fluctuating workweek."

Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week, and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for that week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary agreement.

Your client has proposed paying employees by the fluctuating workweek method with the following conditions:

- If the employer fails to provide work for the full workweek the employee will receive their full salary.

- If the employee is absent from work for a full day to take care of personal business, the employer will charge one day's vacation against the employee's accrued vacation, thus there will be no reduction in pay. If the employee has not accumulated any vacation days, the employer may dock their salary 1/7th of their weekly salary amount.

- If the employee is absent from work because of personal illness, the provisions of the Family and Medical Leave Act (FMLA) Regulations Part 825, Section 825.206 will apply unless the illness does not qualify under the FMLA. If the illness does not qualify under the FMLA, the employer will charge the day against the employee's allowance for sick leave. If the employee has no sick days, e.g., a new employee, or if the employee has used all their sick days allowance, the employer may dock the employee's salary 1/7th of the weekly salary amount.

- Absences that qualify as bona fide FMLA leave will be made in accordance with the Regulations, Part 825.206.

You further state that this proposal for handling deductions from the fluctuating workweek salary method of payment is "patterned" after the "salary basis" method of payment set forth in the Regulations, Part 541, Section 541.118.

Based on the above conditions, we do not agree that your client may meet his overtime pay obligations by use of the fluctuating workweek. The discussion of "salary basis of payment" contained in 29 CFR §§541.118 refers to the salary requirements for employees who may qualify for exemption from the minimum wage and overtime pay requirements under §§13(a)(1) of the FLSA, and not to the salary requirements under the fluctuating workweek method of compensation. Deductions for absences for personal business

or routine sickness generally may not be made from the salary of an employee paid on a fluctuating workweek basis. However, disciplinary deductions, which do not cut into the required minimum wage or overtime compensation, may be made for willful absences or tardiness or for a situation such as an employee being sent home from work because of drunkenness.

Section 825.206(b) of the Regulations, Part 825 discusses the interplay between the FMLA and the fluctuating workweek method of payment. For an employee paid according to the fluctuating workweek method, who is utilizing intermittent or reduced schedule FMLA leave, the employer may during the period of the leave compensate the employee on an hourly basis and pay only for the hours worked, including time and one-half the employee's regular rate for overtime hours. If the employer does not elect to convert the employee's compensation to an hourly basis, no deduction may be made for FMLA leave absences.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Supreme Court, U.S.
FILED
SEP 10 2001
CLERK

(3)

No. 00-1891

In The
Supreme Court of the United States

George C. Samson, et al.

Petitioners,

v.

Apollo Resources, Inc,
doing business as Apollo Services Inc;
Jeffrey A. Reddoch and Chiquita Reddoch

Respondents,

On Petition for Writ of Certiorari
To The United States Court of
Appeals For The Fifth Circuit

Petitioners' Reply to Brief in Opposition

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REPLY TO BRIEF IN OPPOSITION

In its Opposition Brief, Apollo reargues its version of the facts, many of which were not accepted by the trial and appellate courts. Apollo's strategy is apparent; it reargues its case: (1) to try to characterize Petitioners' cert petition as one involving improper fact-finding when the Court and the parties agree as to all pertinent facts; (2) to generate sympathy with the Court to divert attention from the fact that Apollo blatantly ignored the Department of Labor's warnings that Apollo's payment policies violated 29 CFR § 778.114; and (3) to divert the Court's attention from the facts to which the parties and the lower courts agree. This cert petition is based only on those facts which the parties and the lower courts are in agreement.

The parties, the trial court and the appellate court all agree that Apollo docked its employees' guaranteed salaries when they missed work for personal business.[1] The parties, the trial court and the appellate court all agree that the 1966 Dept. of Labor (DOL) Opinion Letter No. 479 expressly prohibits 778.114 salary deductions when an employee misses work due to "illness, personal business, or other reasons."[2] (Recall that under 29 CFR § 778.114, an employer is allowed to pay only

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[1] In its Opposition Brief, Apollo does not dispute that Apollo docked Norman Landry's salary for his three pre-approved absences to take care of personal business. Apollo also admitted at trial that it docked other employees' salaries when they missed work for personal business and that it had a policy of doing so. TT p. 53, ln 8-12; TT p. 1221, ln 8-15. Apollo does dispute that it docked its employees salaries when they missed work due to illness but this cert petition is not based on those deductions. At trial, Apollo's president admitted that the DOL, in its investigation, found that Apollo made improper deductions. TT p. 1180, ln 7-18; p. 19, ln 12-18.

[2] *See*, Dist. Court's Add'l Reasons for Judgment, App. p. 48a; Appellate Court Opinion, App. p. 17a. (Appendix Items in Petitioners' Original Brief are cited as "App." in this brief.)

half-time for overtime hours, instead of time and one-half, but in return, the employer must guarantee the full weekly salary even when the employee does not work forty hours.) The trial and appellate courts both ruled that DOL Opinion Letter No. 479 was somehow overruled by later DOL opinion letters issued in 1969 and 1982 that allow employers to make disciplinary deductions.[3]

The lower courts then created their own standard for when deductions could and could not be made in 29 CFR § 778.114 payplans. The Trial Court stated: "This Court finds that an employer using the FWWM may take deductions from an employee's salary where the employee absents himself from work for personal reasons, other than sickness or an accident." Dist. Court's Add'l Reasons for Judgment at App. p. 49a. (The appellate court affirmed the District Court's ruling. App. pp. 17a-19a.)

The trial court's ruling of law contradicts DOL Opinion Letter No. 479 and later DOL opinion letters. The very 5/28/99 DOL Opinion Letter cited by Apollo in its Opposition Brief clearly states that while disciplinary deductions may be made for "willful absences or tardiness," deductions "for absences for personal business or routine sickness" may not be made in 778.114 payplans. Apollo's Opp. Brief App. pp. 4a-5a.

It is undisputed that in their rulings, both the trial and appellate courts completely ignored DOL opinion letters issued in 1995, 1996, 1997 and 1999 that restate and affirm the language of DOL Opinion Letter No. 479 prohibiting salary deductions when employees miss work due to illness, personal business or other reasons. *Appendix Items G-J, pp. 58a -71a.* The petitioners cited these later opinion letters to the Fifth Circuit and how they reiterate the language in DOL Opinion

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[3] Appellate Court Opinion, App. pp. 17a-19a. Referring to DOL Opinion Letter No. 479, the trial court stated "I don't care what that opinion letter says." TT p. 1191, ln 21-24.

Letter No. 479. In their Petition for Panel Rehearing to the Fifth Circuit, the plaintiffs even summarized and quoted the operable language from these later opinion letters, pointing out to the Court that these letters unequivocally demonstrate that the DOL had not abandoned its ruling in DOL Opinion Letter No. 479, but the Fifth Circuit refused to grant the rehearing even after being shown that it had made an error of law. In contradiction to the respondents' statement in its opposition brief, the petitioners did ask the Fifth Circuit to request an amicus brief from the DOL, but the court refused.

The Trial Record Shows That Apollo's Opposition Brief Has Misstated And Expanded The Record To Generate Sympathy And To Divert The Court's Attention From The Real Issues Presented in Petitioners' Cert Petition

In its Opposition Brief, Apollo has implied that there is disagreement as to the facts in an attempt to portray this petition as unworthy for review. However, as to the critical facts pertinent to this cert petition, there is no disagreement. Apollo either admitted to the facts on the stand or the trial court made a finding of fact.

In its Opposition Brief, Apollo has implied that it was not "cited" by the Department of Labor (DOL). However, on the stand, under questioning by plaintiffs' counsel and by the trial court, Apollo admitted several times that it was indeed cited by the Department of Labor for not following the requirements of 29 CFR § 778.114. TT p. 9, ln 9 - 12; p. 29, ln 5-14.[4] Apollo does not dispute that the DOL citation was signed by the DOL investigator and his supervisor and that

[4] Apollo admitted that the DOL found that Apollo had taken improper deductions from its 778.114 payplans and was cited for taking improper deductions. TT p. 19, ln 12-18.

Apollo was cited as owing $385,915 to 65 employees.[5] TT p. 18, ln 6-14. The DOL investigation and its subsequent discussions with Apollo lasted twelve months so the investigation was not cursory. On the stand, Apollo admitted that the DOL was applying the standards set out in DOL Opinion Letter No. 479. TT p. 55, ln 22 - p. 57, ln 16; p. 79, ln 6-15. Apollo also admitted, on the stand, that it tried to dissuade the DOL from its position, arguing that those standards were supplanted by the 1982 "Otter Letter," but the DOL refused to abandon the standards set out in DOL Opinion Letter No. 479. TT pp. 49-52, p. 57, ln 9 - 16.

Apollo does not dispute that the DOL sent 16(b) letters to the affected employees.[6] This is further proof that Apollo was cited because the DOL would not have been allowed to send these letters if it had not indeed first cited Apollo. At trial, Apollo's expert, a former DOL investigator, admitted that the DOL does not send 16(b) letters if they have concerns that back wages are not actually due. TT p. 13, ln 6-10.

In its Opposition Brief, Apollo quotes Don Strobel (its trial expert and the person who Apollo hired in 1995 to represent them during the DOL investigation) as saying that the DOL's investigation was "poor." Strobel's sole reason for saying that the investigation was "poor" was because the DOL

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[5] In its Opposition Brief, Apollo correctly notes that the DOL's First Corrected Report was not submitted, but in its brief, Apollo fails to mention the Second Corrected Report which was issued. The Second Corrected Report was the one that was signed by the DOL investigator and his supervisor and was the report that was issued to Washington. This report shows that 65 employees were owed $385,915. Apollo itself acknowledged that the Second Corrected Report was issued because it paid $6,671 in back-wages based on this report.

[6] In its Opposition Brief, Apollo says that these were "modified" 16(b) letters but 16(b) letters are often modified from the "standard language" to encompass the individual facts of the investigation, employer and employees.

did not interview every single affected employee. TT pp. 32-33. However, the DOL is not required to interview every single employee; in fact, the DOL need only interview a small percentage of employees if that is enough to uncover improper policies. *E.g., Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 66-68 (2nd Cir. 1997)(a representative sample of 2.5% is enough), *citing, Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)(8 of 300, or 2.7% of the employees is sufficient). Further, the DOL did not need to interview any employees to determine that Apollo was taking improper deductions because, in its conversations with Strobel, Strobel admitted that Apollo had taken deductions that violated DOL Opinion Letter No. 479. TT p. 53, ln 8-12; p. 79; p. 130, ln 21-24; p. 61, ln. 9-22; pp. 49-52; pp. 56-57.

In its Opposition Brief, Apollo alleges that the DOL's Solicitor's Office chose to not prosecute because the investigation was flawed but, on the stand, Strobel admitted that Apollo did not know why the DOL chose to not prosecute the case themselves. TT p. 29, ln 5-14. As noted in petitioners' principal brief, the DOL Solicitor's office is extremely understaffed and cannot prosecute all meritorious claims.

Norman Landry's Absences

Apollo does not dispute that there were only four weeks where Norman Landry worked less than forty hours and that Apollo chose to dock his guaranteed salary in three of those weeks. Apollo does not dispute that the first week involved a one-day absence to move his family; the second week involved a one-day absence for medical testing to determine the cause of severe headaches; and the third week involved a one-day vacation. In its Brief in Opposition, Apollo states that these absences were not excused (i.e., approved with pay) but Apollo does not dispute that they were pre-approved, Apollo just says that they were pre-approved without pay. The trial court found

that Landry talked with his supervisor, Apollo's operations manager, prior to each of the absences and the absences were pre-approved by the operations manager. TT p. 1190, ln 14-16; p. 1191, ln 10 -p. 1192, ln 11; 868, ln 8-10, p. 869, ln 9-24; p. 871, ln 10 - 19.[7] Since the absences were pre-approved, they cannot be considered "willful" or meriting a disciplinary deduction.

The lower courts found that Apollo's deductions from Landry's salary were allowed because, even though the absences were pre-approved, they involved personal business. Appellate Court Opinion at App. pp. 17a-19a; Dist. Court's Add'l Reasons For Judgment, App. pp. 48a-49a. But their "rule of law" is in direct contradiction to ALL recent DOL opinion letters, including the 1999 DOL opinion letter cited by Apollo in its Opposition Brief.

In its Opposition Brief, Apollo mentions that at trial, Landry stated that he would have been willing to forego the day's pay for the day he had to move his family, but that is irrelevant. An employer must comply with all wage and hour laws, even if an employee is willing to accept less. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). If an employer wants to take advantage of the 778.114 payplan to pay only half-time for overtime hours, it must also pay the full guaranteed salary when the employee misses work due to illness, personal business or even vacation. 12/24/97 DOL Opinion Letter 1997 WL 998050 (App. p. 58a).

Absences Of George Samson, Kevin Smith And Melvin Smith

This cert petition does not rest on any of the salary

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[7] Further, Apollo did not object to the introduction of letters from Dr. Patrick Sonnier's and Dr. Harold LeDoux's offices showing that on July 5, 1995, Landry missed work because they were performing tests to determine the cause of his severe headaches. Plaintiffs' Trial Ex. 51.

deductions Apollo made to George Samson's, Melvin Smith's or Kevin Smith's 778.114 salaries. In its Opposition Brief, Apollo spent much text justifying these deductions. Therefore, a short response is justified. At trial, Apollo's president stated that he made the determination to dock their guaranteed salaries when he heard a rumor that Samson and the Smiths were playing hooky together. TT p. 1162, ln 18 - p. 1163, ln 6; p. 1158, ln 2-6. However, it is undisputed that the three individuals missed on different days.[8]

This "hooky story" has little credibility given the fact that all of Apollo's internal records, which were completed by Apollo management, say that the employees were "sick" on the days in question.[9] In its investigation, the DOL found that Apollo took salary deductions even when employees were sick. Apollo's president even admitted that in its investigation, the DOL also found that Apollo docked its employees' salaries when they sent them home because they did not have enough work for them. TT p. 1180, ln 7-18. The weeks Samson and the Smiths were docked were some of the slowest weeks in Apollo's history. TT pp. 1168-71; Plaintiffs' Trial Ex. 57, pp. AR0967-77.[10]

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[8] In its Opposition Brief, Apollo states that the absences were "near simultaneous" and "around the same weekend." But employees cannot be playing hooky together if they miss on different days. It is undisputed that George Samson missed on 10/19/95 and 10/20/95; Melvin Smith missed on 10/20/95 and Kevin Smith missed on 10/23/95 and 10/24/95.

[9] Apollo's own "Tracking Reports," "Absentee Rosters," and "Attendance Calenders" for each employee all list Samson and the Smiths as being "sick" and "sick/no-pay" on the days their salaries were docked. Plaintiffs' Trial Exhibits 10, 39, 41, 48 & 49.

[10] There is no allegation that Landry was playing hooky and the lower courts found that Apollo's deductions from Landry's salary were allowed because, even though those absences were pre-approved, they

Contrary to Apollo's insinuations, the trial court never ruled that these employees were not sick, that they were playing hooky or even that they failed to bring in a doctor's excuse (because one does not always go to a doctor when one is sick and Apollo admitted that doctor excuses were often misfiled). Instead, the trial court ruled that if an employee was improperly paid, he/she had a duty to complain. MJML Tr. p. 47, ln 10-14. This misstates the law as there is no duty to complain. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). Nevertheless, even though Apollo's internal records indicate that Apollo knew these employees were sick and the trial court stated an improper rule of law, this cert petition does not rely on the Samson and Smith salary deductions.

Other Mischaracterizations By Apollo

Apollo's insinuations that the plaintiffs did better financially under its 778.114 payplan than they would have under a conventional (time and one-half) payplan is ludicrous. Apollo's president admitted that the thirty original plaintiffs averaged 60 hours per week. TT pp. 1132-35. While there were some weeks where employees worked less than 40 hours and were still paid their full salary, there were a similar number of weeks where employees worked 80 hours or more. Id.[11]

Simple math shows that if someone is working 60 hours per week, he/she makes more money if they are paid time and one-half for overtime hours as opposed to only half-time. Using Apollo's hours, the plaintiffs calculated that Apollo

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involved personal business. MJML Tr. p. 49, ln 17-24; p. 63, ln 24 - p. 64, ln 2. Appellate Court Opinion at App. pp. 17a-18a. (MJML Tr. refers to the transcript for Apollo's Motion for Judgment As a Matter of Law - Trial Record Volume 24.)

[11] Of the 640 weeks worked by the thirty original plaintiffs, there were 94 weeks where they worked 80 hours or more. In 27 of those weeks, the employee worked 90 hours or more. TT p. 1135, ln 8-16.

would owe them over $150,000 under the conventional, 29 U.S.C. §207, time and one-half payplan. The DOL calculated that the 65 employees in its investigation would have made nearly $400,000 more under a conventional payplan.

Apollo would have the Court believe that, even though the plaintiffs' allegations, the testimony at trial and the DOL's fact-findings all support each other, all thirty plaintiffs and the DOL conspired against Apollo to bring a trumped up case. Again, one of the reasons for the mischaracterizations is to divert the Court's attention from the fact that there is no disagreement that Apollo docked Norman Landry's and other employees' 778.114 guaranteed salaries when they missed work to take care of personal business, that Apollo admitted that it had a policy of docking its employees' salaries when they missed work for personal business and that DOL Opinion Letters published in 1966 and the late 1990's all prohibit employer's from docking their employees' 778.114 salaries when they miss work for personal business.

Summary And Closing

The trial and appellate courts found that taking off for personal business was a "willful absence" subject to disciplinary deduction. However, the DOL, in its opinion letters and in its citation of Apollo, has unequivocally stated that under 778.114 payplans, missing work for personal business is not a willful absence and not subject to disciplinary deduction. The trial and appellate courts made an error of law which needs correction by this Court.

The Court should choose to hear this case as all the facts concerning Apollo's docking for personal business were admitted to and confirmed by the lower courts in their opinions. 778.114 cases are very expensive and very few cert petitions reach the Court as evidenced by the fact that in the last twenty years only three 778.114 issues have been presented to the Court for cert; none were granted. Since the *Overnight Motor*

Transportation Co., Inc. v. Missell, 316 U.S. 572 (1942), decision 59 years ago, the Court has issued no opinions clarifying this case or 29 CFR § 778.114. As such, the appellate and district courts have been free to shape the law governing 778.114 payplans as they see fit and their rulings have expanded employer rights well beyond those anticipated or allowed by *Overnight Motor* and the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The fact that Apollo's employees averaged 60 hours per week makes this an appealing case for the Court to illustrate the abuse that can occur with an unregulated 778.114 payplan; Apollo saved hundreds of thousands of dollars by paying half-time for overtime as opposed to time and one-half.

Another reason for granting the writ application of this case is to define the amount of deference that is due an agency regulation that was enacted in response to a judicial opinion as opposed to a legislative act. 29 CFR § 778.114 was promulgated by the DOL as a direct response to this Court's *Overnight Motor* opinion. Oral argument may not even be necessary, since Apollo is citing DOL opinion letters stating the very rule of law advocated by the petitioners.

For the foregoing reasons, and those stated in Petitioners' Original Brief, certiorari should be granted.

Respectfully submitted,

/s/ _____

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